88-2001

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.*

PETITION FOR WRIT OF CERTIORARI

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AND

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QUESTION PRESENTED

1. Whether it is a violation of the Petitioners' Due Process rights, under the Fifth and Fourteenth Amendments of the Constitution of the United States, for the Oklahoma Supreme Court to arbitrarily fail to follow the rules of civil procedure by narrowly construing the Petitioners' pleadings, and capriciously refusing to acknowledge allegations of fraud for the first time on appeal thereby dismissing the Petitioners' claim with no requisite opportunity to amend the pleading and cure the alleged defect?

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* The caption does not contain the names of all parties to the original proceeding in this case. The Court should be informed that the trial was bifurcated on the issues and a jury trial held, and judgment ultimately entered in favor of the Petitioners, against the tavern owner Ken Becknell, individually and d/b/a Cowboy Country, with a default judgment entered against the Defendant driver Christine Annette Slusher a/k/a Christine Annette Stingley and Ricky B. Henderson. The Petitioners herein are seeking a review of disposition of the issue of the uninsured motorist question which involves only the Respondent herein.

As required by Rule 28.1 of the Rules of the Supreme Court of the United States, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of the Respondent, Farmers and Merchants Insurance Company: The Royal Insurance Group; The Silvey Corporation; Tri-State Insurance Company; Midwestern Insurance Company and New American Life Insurance Company.

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Silver v. Farmers and Merchants Insurance Company, 60 O.B.J. 554 (Okla. February 28, 1989).

GROUNDS OF JURISDICTION

This Court has jurisdiction over this case by virtue of Title 28, U.S.C.S. § 1257, which entitles the Petitioner to seek certiorari for the review of an Opinion of the Supreme Court of the State of Oklahoma "where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States." The Oklahoma Supreme Court, in its Opinion of May 3, 1988, as corrected on February 28, 1989, narrowly construed the factual and legal argument of the Silver family' trial brief to contain an admission which would exclude any claim of fraud or misrepresentation from the allegations of the Second Amended Petition. The Court declined to recognize the Silvers' repeated references of misrepresentation and arguments making a distinction between "intentional misrepresentation" and "negligent misrepresentation". As a result of the failure of the Court to liberally construe the allegation of the Second Amended Petition, these Petitioners

were denied their statutorily mandated remedy of amending their pleading, curing the alleged defect or of having their day in court on the well-pleaded facts of negligent misrepresentation and fraud. Therefore in violation of, and in direct conflict with, the protections guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution, these Petitioners were not afforded their fundamental prerogatives to equal justice, fair play and due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States reads, in pertinent part:

> No person shall be. . . deprived of life, liberty, or property, without due process of law. . .

Section 1 of the Fourteenth Amendment of the Constitution of the United States reads, in full:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners herein ("the Silver family"), as Plaintiffs below, filed their original claim for relief in the District Court of Cleveland County, State of Oklahoma, for the wrongful hit-and-run death of their 12-year-old child against the drunk driver, her culpable passenger who aided in furthering the crime and a tavern owner who owned and negligently entrusted the offending vehicle to the intoxicated driver. The Second Amended Petition, which added the Respondent, an uninsured motorist insurance company (hereinafter "Farmers and Merchants"), as a Defendant, was filed on the 30th day of November, 1984, alleging fraudulent misrepresentation and a breach of a duty to properly inform the insureds of the full extent of uninsured motorist coverage ("UMC") upon the purchase of an automobile liability policy. The pleading alleges that Farmers and Merchants told the Silver family that UMC covered only property damage to the vehicle thereby misrepresenting the fact that UMC would cover the Silver family and their deceased son if bodily injury or death was caused by an uninsured motorist or motor vehicle. (Appendix E: Second Amended Petition). In that same year and each year thereafter until the collision, and in reliance upon those

negligent misrepresentations, the Silver family signed a waiver/rejection of UMC.

On December 10, 1984, Farmers and Merchants filed its Answer but failed to raise any "12(B)(6) defenses",[1] by its Answer or by any timely filed motion.

Six months after Farmers and Merchants filed its Answer, on the morning the matter was called to jury trial on June 3, 1985, Farmers and Merchants filed what was labeled a Motion to Dismiss, stating that:

> 1. There is no justifiable cause of action against this defendant and in favor of the plaintiffs under the laws of the State of Oklahoma.
>
> 2. The testimony of plaintiffs, by deposition, and the evidence of documentation in defendant's file reveals that plaintiffs have consistently rejected uninsured motorist coverage . . . and that such

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[1]OKLA. STAT. tit. 12, § 2012(B) (1988), in pertinent part, reads as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:. . .
>
> 6. Failure to state a claim upon which relief can be granted;. . .
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . .

> rejections are in the form of written, signed rejection of coverage.

(Appendix G: Farmers and Merchants' Motion to Dismiss). The next day, at jury docket call after all pretrial proceedings had been completed and the Petitioners stood ready for trial, the Trial Court overruled Farmers and Merchants's Motion to Dismiss and entered the following Court Minute:

> Question of uninsured motorist to be submitted on stipulations and/or briefs 9 a.m. 1 Jul 85. Farmers M to D O.R. (Appendix I: Court Minute)

The Silver family' pleading remained inviolate.

The Trial Court subsequently entered summary judgment in favor of Farmers and Merchants upon the reserved issue of whether the Silver family had made a knowing waiver of UMC "after full file review and consideration of the briefs, deposition testimony, and affidavits of the parties, and being fully advised in the premises. . .", as reflected in the Journal Entry of Judgment (Appendix D), filed on September 19, 1985.

The Silver family made a timely appeal to the Oklahoma Court of Appeals where the Trial Court's decision was reversed and the case was remanded to the District Court for a determination of a factual issue material to the outcome of the Silver family's claim with the following directions to the Trial

Court to use the following criteria in determining whether the insurance company made a meaningful offer of UMC:

> 1) the method of the offer must be commercially reasonable;
>
> 2) The limits of the optional coverage must be specified, not merely offered in general terms;
>
> 3) the insurer must intelligently advise the insured of the nature of the optional coverage; and,
>
> 4) insurer must advise insured that the coverage is available at a relatively modest increase in premium.

(Appendix C: Court of Appeals Opinion).

On May 3, 1988, as a result of Farmers and Merchants's Petition for Rehearing,[2] the Oklahoma Supreme Court vacated the Opinion of the Oklahoma Court of Appeals and affirmed the Trial Court's summary judgment in favor of Farmers and Merchants.

In rendering its Opinion, the Court analyzed "the insureds' single pleading" (Appendix B: Opinion of the Oklahoma Supreme Court) and narrowly construed the allegations therein rather than utilizing the liberal rules of construction required by the Oklahoma Pleading Code.

A pleading must not be dismissed for failure to state a

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[2]Filed on April 17, 1987

legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief.[3] A Motion to Dismiss and a Motion for Summary Judgment take all well pleaded facts as true and make all reasonable inferences in favor of pleader or party opposing the Motion for Summary Judgment.[4]

On May 23, 1988, the Silver family filed a Petition for Rehearing through which the divided Court corrected its previous opinion but denied rehearing (Appendix B).

The Supreme Court, in its decision, said that a common law claim for bad faith, intentional misrepresentation or intentional fraud is not available to the Silvers. The Court refers to the Silver trial brief as an admission that such claims are not available in Footnote 8 of its Opinion wherein the Court sets forth the language from the trial brief and the law supporting the Court's finding of an admission. However,

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[3]Frazier v. Bryan Memorial Hospital Authority, 60 O.B.J. 1202, 1204 (Okla. May 9, 1989), citing Conley v. Gibson, 355 U.S. 41 (1957) and Atchison, Topeka & Santa Fe Ry Co. v. Buell, ___ U.S. ___, 107 S.Ct. 1410, 1417 n. 15, 94 L.Ed.2d 563 (1987).

[4]5 Wright & Miller, § 1363, p. 656; Ross v. City of Shawnee, 683 P.2d 535 (Okla. 1984); see also, Weaver v. Pryor Jeffersonian, 569 P.2d 967 (Okla. 1977).

contrary to the rules of procedure, the Court narrowly construed the words "intentional misrepresentation" and "intentional fraud" to include all forms of misrepresentation or fraud which are actionable. The Silver family made no such concession regarding negligent misrepresentation or other forms of fraud.

Instead, the Silver family affirmatively set forth in its trial brief that Farmers and Merchants was guilty of misrepresentation and fraud. (Appendix E). It is this refusal to acknowledge other forms of misrepresentation or fraud than intentional fraud or intentional misrepresentation that causes the Silver family to have their Constitutional rights of having a day in court on well-pled facts of negligent misrepresentation destroyed.

ARGUMENT

I.

THE OKLAHOMA SUPREME COURT EFFECTIVELY DENIED THE PETITIONERS THEIR CONSTITUTIONALLY PROTECTED RIGHTS OF DUE PROCESS OF LAW BY ARBITRARILY REFUSING TO ACKNOWLEDGE THE FRAUD CLAIM

A. The Oklahoma Supreme Court's Narrow Interpretation of the Pleading Is Contrary to the Rules of Construction as Set Out in the Oklahoma Pleading Code Thus Violating Petitioners' Due Process Rights

Oklahoma law does not focus on the technical aspects of pleading but, rather, on the substance of what is contained in the pleading.

> The policy of the Oklahoma Pleading Code of deciding cases on the basis of the substantive rights involved rather than technicalities requires a plaintiff to be given every opportunity to cure a formal defect in his pleading. Under subsection G of Section 2012 the court must allow the plaintiff an opportunity to amend the petition within a specified time and should not dismiss the action, unless it appears to a certainty that the plaintiff cannot state a claim.[5]

Fair notice of any claim is all that is required of the pleadings.

Under Oklahoma's Pleading Code, the Plaintiffs were not required to designate the theory of recovery relied upon but were entitled to any relief which the facts justified.[6]

This Honorable Court has itself recognized the functions of pleading as giving "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[7] The allegations as pled certainly give Farmers and Merchants notice of the facts

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[5]Committee Comment on the provisions of OKLA. STAT. tit. 12, § 2012(G) (1988) (emphasis added).

[6]Doss Oil Royalty v. Texas Co., 137 P.2d 934 (Okla. 1943).

[7]Conley v. Gibson, 355 U.S. 41, 47 (1957).

upon which the claim relies even without the use of technical words. Farmers and Merchants even conducted discovery on the issue of misrepresentation. Words such as "fraudulent," "misrepresentation," "knowingly" or "recklessly made" need not be used.[8] The Silver family pled the specific facts without technical words and has been rebuffed without an opportunity to amend the pleading or to have the rules applicable to pleadings being applied with equal fairness and unarbitrarily. When the allegation of the Silver family pleading is taken as true as the Court must do under the rules applicable to a Motion to Dismiss or a Motion for Summary Judgment, it is clear that Farmers and Merchants' misrepresentations of uninsured motorist coverage misled the Silver family and induced them into an unknowing waiver of such coverage.

The Oklahoma Supreme Court has made an arbitrary and unfair application of basic procedural rules to justify an unwarranted conclusion in violation of the Silver family' Constitutional Due Process rights. Rules of procedure are designed to insure interests of a fair trial. Failure to use appropriate pleading construction rules can result in unfairness

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[8]Lone Star Gas Co. v. Oatman, 283 P.2d 810 (Okla. 1955).

and deprivation of property rights to the extent of unconstitutionality. Equal application of the law to all persons is a fundamental right. No clearer is the inconsistency of the application of procedural rules by the Oklahoma Supreme Court evidenced than by that Court's most recent decision in the case of Frazier v. Bryan Memorial Hospital Authority,[9] in which the Oklahoma Supreme Court treated the Defendant's Motion to Strike as a Motion to Dismiss. The Court there said:

> A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief.[10]

Such rules were not applied by the Court to the Silver family's pleading.

B. The Negligent Misrepresentation or Fraud Allegations in Petitioners Second Amended Petition Were Pled With Sufficient Particularity As Required By Oklahoma Law.

OKLA. STAT. tit. 12, § 2009(B) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiffs stated with particularity the misrepresentation. The misrepresentation

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[9]60 O.B.J. 1202 (Okla. May 9, 1989), the Court will note that this decision was issued subsequent to the Opinion appealed in these proceedings.

[10]Id., at 1204.

was pled by alleging what the true facts should have been represented as compared to what was the actual misrepresentation made by Defendants. The language in the pleading which states particularly what the true representation should have been is:

> At the time Randall Silver purchased the insurance policies from the Defendant, Farmers and Merchants Insurance Co., the Defendant, Farmers and Merchants Insurance Co. failed to inform the Plaintiff that uninsured motorist coverage would cover Plaintiffs and their deceased son if damage occurred by an uninsured motorist or motor vehicle. (Appendix E).

This allegation contains both facts covering violation of a duty to inform as well as the factual predicate for the misrepresentation.

The Second Amended Complaint then further states with particularity what Farmers and Merchants had misrepresented to the Silver family:

> Rather, said Defendant improperly informed Plaintiff, Randall Silver, that uninsured motorist insurance would only cover property damage if Plaintiffs or their family members were involved in a collision with an uninsured motorist. (Appendix E).

Clearly, Plaintiffs factually pled a fraudulent misrepresentation as defined by OKLA. STAT. tit. 15, § 58:

> Actual fraud . . . consists in any of the following acts, committed by a party to the contract, . . . with intent to deceive another party thereto, **or** to induce

him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The positive assertion in a manner not warranted by the information the person making it, of that which is not true, though he believe it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact.

. . .

5. Any other acted fitted to deceive. (Emphasis added).

Clearly, it was pled that Farmers and Merchants induced the Silvers to enter into a contract of waiver:

Such failure to properly and fully inform Plaintiffs as to the available coverage induced Plaintiff, Randall Silver, to sign a rejection of such uninsured motorist coverage. (Appendix E)

The misrepresentation by Farmers and Merchants come under either paragraph 1, 2, 3 or 5 of OKLA. STAT. tit. 15, § 58.

Deceit is defined at OKLA. STAT. tit. 76, § 3 as either:

1. The suggestion, as a fact, of that which is not true by one who does not believe it to be true.

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of

communication of that fact; . . .

The misrepresentation by Farmers and Merchants come under either paragraph 1, 2 or 3 above.

Further, as the Oklahoma Supreme Court noted in its Footnote 8 of its Opinion, the elements of a common law action for fraud are: (1) A material misrepresentation, (2) knowingly or recklessly made, (3) with intent that it be relied upon, and (4) the party relying on the false statement suffers damages.[11] (Emphasis ours).

"With intent that it be relied upon" can be safely found within the inducement language to sign a written rejection and the language the party relying on the false statement suffers damage can certainly be found in the language:

> Due to the failure of Defendant, Farmers and Merchants Insurance Co. to properly, fully and adequately inform Randall Silver of the uninsured motorist coverage, Randall Silver lacked the requisite informed consent to sign a rejection of such coverage. Due to the failure of the Defendant, Farmers and Merchants Insurance Co. to adequately and properly inform Randall Silver of the uninsured motorist coverage and the damages sustained by Plaintiffs and their decedent, and because of such insurance policies of the Defendant, and of the facts in this case, Plaintiffs are entitled to judgment

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[11] Bras v. First Bank and Trust Co., 735 P.2d 329, 333 (Okla. 1987); D & H Co. Inc. v. Schultz, 579 P.2d 821, 824 (Okla. 1978). (Emphasis ours).

against Farmers and Merchants Insurance Co. for all damages in the sum of $9,505,613.71. (Appendix E).

Farmers and Merchants' misrepresentations are pleaded as common law fraud as well, yet the Oklahoma Supreme Court found admitted in the Silver family's trial brief that fraud was not a basis for the family's claim.

The Oklahoma Legislature has broken down "actual fraud" into two distinct categories. The first category requires that fraudulent act be committed "with intent to deceive another party thereto." The second category, which has often been referred to as "negligent misrepresentation," requires that the fraudulent act be committed "with intent to induce him [another party] to enter into the contract."[12]

The distinction must be made that a party can intend to induce another party to enter into a contract, by making false representations that the fraudfeasor believes to be true, without actually intending to deceive the other party.

The "intent to deceive" category of actual fraud has been stated by the Oklahoma Supreme Court in terms of whether the Defendant knew when he made the false representation that it

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[12]OKLA. STAT. tit. 15, § 58 (1988); OKLA. STAT. tit. 76, § 3 (1988).

was false. Whereas, the Court has analyzed the "intent to induce" category in terms of whether the Defendant was negligent in making statements without a reasonable ground for believing them to be true,[13] or where a party is induced by such statements, even though the party making the representations actually believes the statements to be true.[14] The gist of fraudulent misrepresentation is producing of a false impression, and the means of accomplishing it are immaterial.[15] Therefore, if a false impression in another's mind is made, the means by which the production of that impression was accomplished becomes immaterial, because the gist of fraudulent

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[13] P.E.A.C.E. Corp. v. Oklahoma National Natural Gas Co., 568 P.2d 1273 (Okla. 1977), (holding, essential element of actionable false representation is scienter or knowledge of falsity of statements made, **or** negligence in making statements without reasonable grounds for believing them to be true).

[14] Madden v. Graham, 174 P. 259 (Okla. 1918) (holding, one is responsible for the truth of what is affirmed by him to be an existing fact or with a view to induce another to part with his property, if his statement is relied on and accepted as true, whether he knew it to be false or not.); Kelly v. Robertson, 160 P. 46 (Okla. 1916) (holding, a party is guilty of deceit under OKLA. STAT. tit. 15, §§ 58 and 60; OKLA. STAT. tit. 76, §§ 2 and 3, where he induces another to enter into a contract by a positive material assertion which is false, though the party making it believed it to be true).

[15] State ex rel. Oklahoma Bar Association v. O'Brien, 385 P.2d 876, appeal dismissed, cert. denied 84 S.Ct. 983, 376 U.S. 649, 11 L.Ed.2d 980 (Okla. 1963).

misrepresentation is production of a false impression in another's mind.[16] Moreover, it is not essential to liability that the person charged with fraud should have received any benefit therefrom.[17]

Under the facts of the present case, even though the acts of the agent may not have been intended to deceive (which the Silver family still concede as they did in their trial brief), it is obvious that the false representations were made with intent to induce the Plaintiffs to enter into the contract of waiver of UM benefits (as was also explained in their trial brief).

Constructive fraud is defined at OKLA. STAT. tit. 15, § 59 as:

> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,
>
> 2. Any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose; even

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[16] Clovis v. Clovis, 460 P.2d 878 (Okla. 1969).

[17] State ex rel. Oklahoma Bar Association v. O'Brien, supra.

an innocent misrepresentation may constitute "constructive fraud" where there is an underlying right to be correctly informed of the facts. This is especially true in light of the public policy considerations underlying UMC.

Uninsured motorist coverage is mandatorily required to be included in every policy of automobile insurance issued in this state unless there exists a written rejection.[18] There is, therefore, a significant public policy favoring uninsured motorist coverage being included either by contract, legislatively, or by judicial adjudication.[19] In fact, the public policy favoring uninsured motorist coverage is so strong that in Brown, supra, the Oklahoma Supreme Court stated, "It is settled in Oklahoma that insurance policy provisions and definitions which purport to condition, limit or dilute the provisions of the uninsured motorist statutes are void and unenforceable." The Court in Chambers, supra, stated:

> The fact that the Oklahoma statute requires that uninsured motorist coverage be offered to every person buying automobile liability insurance and that a written refusal is required to substantiate rejection of such coverage indicate a very clear legislative

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[18]See, OKLA. STAT. tit. 36, § 3636 (1988).

[19]Brown v. USAA, 684 P.2d 1195 (Okla. 1984); Chambers v. Walker, 653 P.2d 931 (Okla. 1982).

> intent in favor of coverage. At 935. (Emphasis ours.)

Insurance contracts are take it or leave it adhesion contracts written in language difficult to understand. Many times insurance companies leave policy provisions in the policy which have been specifically prohibited by our Oklahoma Supreme Court. Thus making it difficult for the lay person to have even a vague understanding of what the policy of insurance really means. People rely upon insurance sales force to tell them what insurance they need and what the policy provisions provide. Insurance agents interpret coverage questions on a daily basis in determining what insurance is needed. Agents are certainly more expert in that regard than the average lay person.[20] The Oklahoma Court of Appeals has held that an individual can rely upon an insurance agent's erroneous representations and the insurer is bound by such representations even if they are contrary to the terms of the written contract.[21] Further, in the syllabus by the Court in

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[20] Allstate v. Pietrosh, 454 P.2d 106 (Nev. 1969).

[21] Warner v. Continental Casualty Co., 534 P.2d 695 (Okla. App. 1975).

Commercial Casualty Insurance Co. v. Varner,[22] the Oklahoma Supreme Court said "An insured's failure to promptly examine an accident policy and discover a departure therein from the real agreement before the loss, was held not to defeat reformation." The Tenth Circuit Court of Appeals, interpreting Oklahoma law, has said, "Under Oklahoma law, an insured has no duty to read his policy and notice discrepancies between it and previous representations of a soliciting agent."[23]

To hold otherwise is to deny the reliance Oklahoma consumers have upon insurance agents. Insurance is expensive enough as it is without requiring a purchaser of insurance to consult with an attorney every time he has a question concerning policy coverage before entering into a contract of insurance. Here, however, the language used by Farmers and Merchants was testified to as being incomprehensible, compounded by misrepresentations of the coverage by one upon whom the Silver family justifiably relied. One cannot make a false statement and then be heard to say that the one to whom it was made should not have relied upon it, but should have

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[22]16 P.2d 118 (Okla. 1932).

[23]Business Interiors Inc. v. The Aetna Casualty and Surety Co., 751 F.2d 361, 364 (10th Cir. 1984).

investigated for himself especially where it may be assumed that the truth of the representations should be within the knowledge of the person making such representation.[24] One cannot take advantage of the fact that another has too confidently relied on the truthfulness of his statements.[25] Even if there is not an underlying right by virtue of a special relationship vis-a-vis the parties, to be affirmatively informed of the facts, if one volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover and to tell the whole truth.[26]

It is respectfully submitted that everyone, even an insurance company, who has no special relationship with an

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[24] Mulkey v. Morris, 313 P.2d 494 (Okla. 1957); Harrell v. Nash, 133 P.2d 748 (Okla. 1943); T.M. Dover Mercantile Co. v. Gates, 277 P. 231 (Okla. 1929); Thompson v. Davis, 254 P. 501 (Okla. 1927); Mangold & Glandt Bank v. Utterback, 174 P. 542 (Okla. 1918).

[25] Martinson v. Hamil, 269 P. 255 (Okla. 1928); Stevens v. Reilly, 156 P. 157 (Okla. 1916).

[26] Gidney v. Chapple, 110 P. 1099 (Okla. 1910), (holding, "although a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement, then, becomes a fraudulent concealment and even amounts to false and fraudulent misrepresentation."); see also, Deardorf v. Rosenbusch, 206 P.2d 996 (Okla. 1949); Berry v. Stevens, 31 P.2d 950 (Okla. 1934).

insured of several years, has a duty to not injure or harm another person, such harm coming in the form of a negligent misrepresentation. This is a general duty recognized in Oklahoma.[27]

It is evident that the misrepresentations by Farmers and Merchants above referred are material misrepresentations. It is evident that Farmers and Merchants either knew of its falsity or the above representations were recklessly made for Farmers and Merchants is in the business of insurance. The allegations as pled certainly give Farmers and Merchants notice of these facts. As suggested above, Farmers and Merchants conducted discovery of and about the misrepresentation.

It is clear that the misrepresentations of uninsured motorist coverage by Farmers and Merchants misled the Silver family inducing the waiver to their detriment. The Silver family cannot be bound by the written rejection due to this false representation or fraud.[28]

C. Intentional Misrepresentation vs. Negligent Misrepresentation.

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[27]OKLA. CONST. art. II, § 6; OKLA. STAT. tit. 76, § 1; and OKLA. STAT. tit. 23, § 3.

[28]All American Bus Lines Inc. v. Schuster, 189 P.2d 412 (1948).

Plaintiffs stated in their trial brief there is no "intentional misrepresentation". (Appendix H). The Oklahoma Supreme Court accepted the statement as an admission. However, Plaintiffs were making the distinction between an intentional misrepresentation and a negligent misrepresentation. (Appendix H). As actual fraud is defined, it may be "the positive assertion in a manner not warranted by the information of the person making it, or of that which is not true, though he believe it to be true." Also, it can be a material misrepresentation made recklessly. Either of those two definitions of fraud fit hand in glove with the pleadings and evidence in this case. Plaintiffs were merely not wishing to over-reach their grounds of fraud.

A significant portion of Appellants' Brief-in-Chief and Reply Brief filed in the Oklahoma Supreme Court argue the distinction between an affirmative, active fraud and a passive, negligent fraud. The Silver family's theory of recovery has always and steadfastly encompassed assertions of fraud or misrepresentation. The Oklahoma Supreme Court declined to recognize Plaintiffs' allegations or the discovery process as supporting a cause of action for negligent misrepresentation but rather narrowly construed the Silver family's Second Amended

Petition in view of the trial briefs.

By the Oklahoma Supreme Court's ruling, the lawyers of Oklahoma will be required to overplead negligent fraud as an active, intentional act, devious in form and nefarious in nature subjecting themselves to a OKLA. STAT. tit. 12, § 2011 sanction for fear that the Oklahoma Supreme Court will react as it did to the pleadings herein. It becomes apparent that gentile pleading practice is not acceptable by that Court. One must plead some evil, egregious mentality on the part of a Defendant when such evil mentality is not necessary under the definitions of fraud or negligent misrepresentation. The Oklahoma Supreme Court's opinion herein requires that there be nothing short of nuclear warfare insuring that both parties will be required to try their case because of the allegations of evil wrongdoing. It is respectfully suggested that these allegations need not be made in their technical sense but must be made factually. What Plaintiffs actually pled were facts of the misrepresentation and now they are being arbitrarily punished for doing what the Court admonishes they must do.

D.Summary Judgment Does Not Test the Sufficiency of the Pleading As The Oklahoma Supreme Court Did.

A Motion for Summary Judgment attacks the sufficiency

of the evidence as opposed to the sufficiency of the pleading:

> . . . on the ground that the depositions, admissions in the pleadings, stipulations, answers to interrogatories and to request for admissions, affidavits, and exhibits on file, . . . show that there is no substantial controversy as to any material fact. Rule 13, Rules for the District Courts of Oklahoma.

Nowhere does Rule 13 speak to the sufficiency of the pleadings.

In fact, the Oklahoma Supreme Court has held a party may not rely on his pleadings to controvert a Motion for Summary Judgment.[29] A summary judgment motion is analyzed in relationship to extraneous materials other than the bald allegations of the pleadings unless there are admissions of fact or law within the pleadings. There are no such admissions in the Second Amended Petition of the Plaintiffs herein. The Court of Appeals in Oklahoma has said, "Clearly, Rule 13, supra, was not intended to be used as a means of testing the pleadings."[30]

Therefore, it is clear summary judgment motions do not address the allegations of the pleadings but seek to test the

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[29] Weeks v. Wedgewood Village, 554 P.2d 780 (Okla. 1976).

[30] Metcalf State Bank v. Gaither, 577 P.2d 468 (Okla. Ct. App. 1977). (Emphasis ours); See also, Beck v. Bacone College, 604 P.2d 876 (Okla. Ct. App. 1980).

evidentiary facts which would support the pleadings.

E. Farmers and Merchants Waived a Defense of Failure to State a Claim.

A defense of ". . . failure to state a claim upon which relief can be granted . . . is waived:

> A. If omitted from a motion that raises any of the defenses or objections which this section permits to be raised by motion, or
>
> B. If it is not made by motion and it is not included in a responsive pleading.[31]

Defendant, Farmers & Merchants, did not file a motion to dismiss within twenty days of the Second Amended Petition or any extension thereof as required by OKLA. STAT. tit. 12, § 2012. The Petition which added Farmers and Merchants as a Defendant was filed on the 30th day of November, 1984. Defendants filed an Answer on the 10th day of December, 1984. This Answer did not claim a defense of failure to state a claim upon relief can be granted. (Appendix F). Therefore, such a defense was waived by Defendant Farmers & Merchants.

Defendant, Farmers and Merchants, had not raised a defense of failure to state a claim by pretrial.

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[31]OKLA. STAT. tit. 12, § 2012 (1988).

It was not until this matter between the Silver family and Farmers and Merchants was called to trial on June 3, 1985, that Defendant filed what was labeled a motion to dismiss. The Court overruled the motion to dismiss the next day at jury docket call.

Had the Trial Court sustained a timely filed Motion to Dismiss on the grounds that there was a failure to state a claim, the Trial Court would have been required to grant leave to the Plaintiffs to amend if the defect can be remedied. OKLA. STAT. tit. 12, § 2012(G) states: "On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed. . . ." However, the Trial Court entered a summary judgment based on evidence and not a dismissal on the pleading. The suggested defect on appeal can be obviously remedied under the facts of this case by remanding to the Trial Court with instructions to permit an amendment. This is precisely the procedure followed in the case of Beck v. Bacone College, supra, where the Trial Court purportedly ruled on a Motion for Summary Judgment without reviewing matters outside the pleadings. Where the Trial Court in effect ruled on a motion to dismiss but had

entered a judgment, the Court of Appeals reversed the judgment, remanded the case to the District Court to give the plaintiff time to amend. Therefore, the Oklahoma Supreme Court should have either remanded the matter to the Trial Court permitting Plaintiffs to amend in conformance with the opinion of that Court or used the rules applicable to all litigants (excepting, evidently, the Silver family).

F. Due Process Abridgement

When the Oklahoma Supreme Court did not recognize the fraud allegation as viable or remand with instructions to grant leave to Plaintiffs to amend the pleadings, the Silver family was effectively denied their day in Court and an opportunity to be heard on technical pleading issues not timely raised before the Trial Court and appropriately deemed waived under our Pleading Code. Farmers and Merchants is given the benefit of having waived a defense and now having that defense restored without an opportunity given to the Silver family to either object or cure the technical deficiency found by the Oklahoma Supreme Court. A fundamental requisite of due process is the opportunity to be heard, and such hearing must be meaningful

and appropriate to the nature of the case.[32] "It has long been recognized that equal access to the Courts, and modes of procedure therein, constitute basic and fundamental rights. The Courts must be open to all on the same terms without prejudice. . . . Access to the Courts and those procedures utilized therein are clearly fundamental rights."[33]

Had the Trial Court sustained the Motion to Dismiss based on the pleadings, Plaintiffs would then have been given an opportunity to amend their pleadings and been given notice of what failings the Oklahoma Supreme Court deemed fatal.[34] Where a particular method of procedure is provided, it must be followed.[35] Instead, the Trial Court overruled the Motion to Dismiss from which Plaintiffs were never given notice that their fraud factual allegations were insufficient. "Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner.

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[32]Matter of W.D., 709 P.2d 1037 (Okla. 1985); York v. Halley, 534 P.2d 363 (Okla. 1975); U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[33]Thayer v. Phillips Petroleum Co., 613 P.2d 1041 (Okla. 1980).

[34]OKLA. STAT. tit. 12, § 2012(G) (1988).

[35]Wolfenbarger v. Hennessee, 520 P.2d 809 (Okla. 1974).

The right to be heard is of little value unless adequate notice is given . . ."[36] The policy of the Oklahoma Pleading Code of deciding cases on the basis of the substantive rights involved rather than technicalities requires a Plaintiff to be given every opportunity to cure a formal defect in his pleading.[37] Therefore, there is a denial of due process by the impact of the Oklahoma Supreme Court's ruling.

CONCLUSION

Rules of procedure are designed to insure interests of a fair trial. Failure to use appropriate pleading construction rules have resulted in unfairness and deprivation of property rights to the extent of unconstitutionality. Equal application of the law to all persons is a fundamental right.

By: _____

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AND

---

[36] First National Bank v. Oklahoma Savings and Loan Board, 569 P.2d 993 (Okla. 1977).

[37] See, Committee Comment to OKLA. STAT. tit. 12, § 2012 (1988).

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ATTORNEYS FOR PETITIONERS

** Counsel of Record

Respectfully submitted this 26th day of May, 1989.

PROOF OF SERVICE

I, Rex K. Travis, Counsel of Record for Randall and Mikala Silver, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of May, 1989, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Farmers and Merchants Insurance Company, the Respondent herein, by delivering a copy thereof to Jim W. Lee, Esq., attorney of record for the Respondent, at his office located at 2728 N.W. 39th Street, P. O. Box 1907, Oklahoma City, Oklahoma, 73157-7320.

REX K. TRAVIS

88-2001

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

CORRECTED

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VOLUME I - APPENDICES A - D

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 64,879
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	FOR OFFICIAL PUBLICATION
Defendants,	)	
and	)	
FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendant-Appellee.	)	

ORDER CORRECTING OPINION ON REHEARING AND DENYING REHEARING

The court's opinion, authored by OPALA, J., promulgated herein May 3, 1988, is hereby corrected as follows:

By striking on page 6 the present language in footnote 11 and substituting the following text:

11 "Fraud is either actual or constructive." 15 O.S. 1981 § 57. Although constructive fraud need not involve intent

to deceive and may be based on a negligent or innocent misrepresentation, it requires a breach of some legal or equitable duty. 15 O.S. 1981 § 59, infra; Faulkenberry v. Kansas City Southern Ry. Co., Okl. 602 P.2d 203, 206 [1979]. Accord Riley Hill Gen. Contr. v. Tandy Corp. 737 P.2d 595, 604 [Or. 1987] and Tatum v. Mid-Century Ins. Co., 730 S.W.2d 41, 43 [Tex.Civ.App. 1987].

The Silvers are precluded from recovery under the theories of constructive fraud and negligent misrepresentation because 1) we hold today that Farmers was under no statutory duty to explain UMC to them, 2) their relationship with Farmers was stricto sensu at arms' length and they did not stand vis-a-vis each other in any recognized form of "special relationship," see Faulkenberry, supra, at 205 n. 2, and 206, and 3) they submitted but one theory to the trial court, that of "waiver" or "breach-of-duty-to-inform," and are hence precluded from seeking relief on appeal under any other theory, see General Motors v. Okl. Cty. Bd. of Equal., Okl., 678 P.2d 233, 239 [1983]; Maryland Casualty Company v. Willsey, Okl., 380 P.2d 254, 259 [1963]; County of Okmulgee v. Robnett, Okl., 368 P.2d 502, 506 [1962]; and Cities Service Oil Company v. Merritt, Okl., 332 P.2d 677, 683 [1958].

The terms of 15 O.S. 1981 § 59 provides:

> "Constructive fraud consists:
>
> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
>
> 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." [Emphasis added.]

By striking on page 10 the present language in footnote 34 and substituting the following text:

APPENDIX A

34 See, e.g., McCloe v. Utah Home Fire Ins. Co., 590 P.2d 941, 943 [Ariz.App. 1979] (At one time Arizona's UM statute required that uninsured motorist coverage "be called to the attention of the insured." Ariz.Rev.Stat. § 20-259.01 (1970). Both the duty to alert insureds to UMC's availability and the right to reject that coverage have been eliminated and replaced by mandatory minimal coverage. See Ariz.Rev.Stat. § 20-259.01 (1986) and Stuart v. Insurance Co. of North America, 730 P.2d 255, 258 and 260 [Ariz.App. 1986].); Dufresne v. Elite Insurance Company, supra note 33 at 353 (Rejection of UMC may be effected only by strict compliance with the specific statutory method.); Georgia Farm Bureau Mut. Ins. Co. v. Drexler, 326 S.E.2d 741, 743 [Ga. 1985] (The court declined to extend the statutory language and hence to require that insurer offer UMC to unnamed insureds.); Dairyland Ins. Co. v. Kelley, 352 S.E.2d 174, 176 [Ga.App. 1987] (Insured was entitled to UMC because rejection statements were not executed according to explicit statutory requirements.); Orolin v. Hartford Acc. & Indem. Co., 585 F.Supp. 97, 101 [N.D. Ill. 1984] (Insurers are required to supply no more than minimal information to apprise insureds of UMC's availability and to prompt further inquiry.); Brady v. University Underwriters Ins. Group, 307 N.E.2d 548, 551-552 [Ohio App. 1973] (Although the insured denied rejecting UMC and knowing of its availability, he undisputedly signed a rejection statement of his own free will. The rejection was held efficacious; absent a common-law misrepresentation claim, no material issues of fact existed. Brady is cited in Poots v. Motorist Ins. Companies, 526 N.E.2d 71, 73 [Ohio App. 1986]); Geisler v. Mid-Century Insurance Company, supra note 20 at 186 (Absent an express statutory requirement, the court declined to impose an affirmative duty upon insurers either to offer or to obtain a signed rejection of coverage that exceeds the legislatively mandated minimum.); but see Patrick v. Cherokee Ins. Co., 512 A.2d 24, 27 [Pa.Super. 1986]; and Vasquez v. Bankers Ins. Co., 502 So.2d 894, 896 [Fla. 1987] (Effective October 1, 1987 a named insured's signature on a statutory form gives rise to a conclusive presumption that "there was an informed, knowing rejection." See Fla. Stat. 1987 Ch. 627.727(1).).

In all other respects the Petition for Rehearing is denied and the May 3, 1988 opinion by OPALA, J., shall stand unmodified and unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 28th DAY OF FEBRUARY, 1989.

CHIEF JUSTICE

Hargrave, C.J., Opala, V.C.J., Lavender, Simms, and Summers, JJ. Concur

Kauger, J. - Concur in Result

Hodges, Doolin and Wilson, JJ. - Dissent

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child,	)	FOR OFFICIAL PUBLICATION
Plaintiffs-Appellants,	)	
vs.	)	No. 64,879
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants,	)	
and	)	
FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendant-Appellee.	)	

ALMA WILSON, Justice, dissenting:

The coverage termed "uninsured motorist coverage" is surely one of the most remarkable contractual undertakings ever devised, for uninsured motorist coverage does not insure uninsured motorists, (third parties); nor does it insure vehicles; rather, uninsured motorist coverage affords first-party coverage

to person(s) for whom the insurance contract is being written. It, thus, matches the complexity of the underlying policy and affords benefits on account of a wide variety of losses: medical expense, lost earnings, pain and suffering, including death. In this state, the indemnity language of uninsured motorist coverage, as mandated by 36 O.S. 1981 § 3636 is this:

> "The policy . . . **shall provide coverage . . .for the protection of persons insured** thereunder who are legally entitled **to recover** damages from owners or operators of uninsured motor vehicle and hit and run motor vehicles **because of bodily injury, sickness or disease, including death** resulting therefrom . . . ." [Emphasis added.]

There has been limited testing of the question how far the offeree must understand the terms of the coverage offered in order to decline it effectively. It has been held that the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation. Lopez v. Midwest Mutual Ins. Co., 223 So.2d 550 (Fla. App. 1969). This view comports with the rule in Oklahoma, as set forth in the early case of All American Bus Lines, Inc. v. Schuster, 199 Okl. 628, 189 P.2d 412 (1948), as follows:

> "Where a party signs a written agreement, in the absence of false representation or fraud, he is bound by it, although ignorant of its contents." [Emphasis added.

In the case now before this Court, Randall alleges that he telephone the agent's office for an explanation of uninsured motorist coverage. He further alleges that it was misrepresented to him that uninsured motorist coverage applies only to property damage caused by an uninsured motorist. He further averred that, relying upon the false explanation given to him, he signed the rejection statement which is the subject of this appeal. When Randall asked for the explanation about uninsured motorist coverage, it devolved upon the insurer to provide a complete and accurate explanation of uninsured motorist coverage, such that Randall would be able to make an intelligent and knowing decision whether to reject the coverage or not. There is always a duty to not state an untrue fact even when there is no duty to speak in the first instance. As stated in Gidley v. Chapple, 110 P. 1099 (Okla. 1910):

> "[A]lthough a party may keep absolute silence and violate no rule of law or equity, yet if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth." [Emphasis added.]

Moreover, it is the law in Oklahoma that everyone has a duty to not injure or harm amother [sic] person, and such harm may stem from negligent misrepresentation. See, e.g., Oklahoma Constitution, Article II, §6; 76 O.S. 1981 § 1; 23 O.S. 1981 §3. Further, the insureds here are not precluded from recovery under a theory of constructive fraud because they stood within the Special Relationship of Insured to Insurer.

> An insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared and seldom understood by the insured. The parties are not similarly situated. The company and its representatives are expert in the field; the insured is not . . . . Allstate Insurance Co. v. Pietrash, 454 P.2d 106 (Nev. 1969). [Emphasis mine.]

Consequently, this Court has held that contracts of insurance are contracts of adhesion as a result of this uneven bargaining position. Wilson v. Travelers Insurance Co., 605 P.2d 1327 (Okla. 1980). This Court has also previously recognized the quasi-public nature of these particular adhesion contracts. In Christian v. American Home Assurance, 577 P.2d 899 (Okla. 1978), we stated:

> In Fletcher, [v. Western National Life Insurance Co., Cal.App.3d 376, 89 Cal.Rptr. 78, 47 A.L.R.3d 286 (1970)], the Court discussed the special relationship between

an insurer and its insured which gives rise to the duty of good faith and fair dealing. The Court observed that the industry has a quasi-public nature, that it involves the public interest . . . . The consumer has no bargaining power and no means of protecting himself from the kinds of abuses set forth . . . . The following discussion of this special relationship between an insurance company and its insured, is relevant here:

> ". . . To some extent this special relationship and the special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured . . . . To some extent the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract . . . to obtain a commercial advantage but to protect [himself]."
>
> [Emphasis added.]

Similarly, in the case of Egan v. Mutual of Omaha Insurance Co., 620 P.2d 141 (Cal. 1979), it is stated:

> The insurer's obligations are . . . rooted in their status as purveyors of a vital service labelled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of

> coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust . . . . Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position.

I am accordingly convinced that a special fiduciary relationship does exist between the insureds and the insurer in this case, and that recovery may be available if the insureds can prove their allegations of constructive fraud and/or negligent misrepresentation.

Under the facts of the present case, even though the acts of the insurer's agent may or may not have been intended to deceive, it is obvious that the false representations were made with intent to induce the Plaintiffs to enter into the contract of waiver of UM benefits. Constructive fraud is defined at 15 O.S. 1981 § 59 as:

> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,

> 2. Any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose; even an innocent or negligent misrepresentation may constitute "constructive fraud" where there is an underlying right to be correctly informed of the facts.

Additionally, with respect to the issue of constructive fraud, I must also register my disagreement with the majority's conclusion that the technical form of the pleadings in this case preclude consideration of the insured's claim on this basis. The Oklahoma Pleading Code provides:

> "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required." 12 O.S. 1988 Supp., §2008(E)(1).

Lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn. This is a fundamental requirement of civil procedure, as evidenced by the mandate of 12 O.S. 1988 Supp., § 2008(F):

> "All pleadings shall be so construed as to do substantial justice."

The function of pleadings is narrow, i.e., to give "fair notice of

what the plaintiff's claim is and the grounds upon which it rests." Conley v Gibson, 355 U.S. 41, 47 (1957). This fundamental criteria has been met in this case. Inasmuch as Randall's claims were sufficiently pleaded and material facts remained in controversy when the trial court granted summary judgment, the trial court erred in granting the insurer's motion for summary judgment at that time. Therefore, this Court should remand this case to the trial court to determine the factual issues raised by Randall's allegations.

I have authorized to state that HODGES, J. and DOOLIN, J. join in this dissent.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,	)	
Appellants,	)	
v.	)	No. 64,879
FARMERS AND MERCHANTS INSURANCE COMPANY,	)	
Appellee.	)	

O R D E R

IT IS HEREBY ORDERED that the opinion of this Court filed and promulgated in this cause on May 3, 1988, be and the same is ordered corrected as follows:

HODGES, J. and DOOLIN, J. should be shown as "Dissent" in lieu of "Concur" as written.

DONE BY ORDER OF THE SUPREME COURT this 27th day of February, 1989.

CHIEF JUSTICE

APPENDIX A

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child,	)	
Plaintiffs-Appellants,	)	FOR OFFICIAL PUBLICATION
vs.	)	No. 64,879
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a-COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants,	)	
and	)	
FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendant-Appellee.	)	

Certiorari to the Court of Appeals, Division 3

In an action by the named insureds for the benefits of uninsured motorist coverage mandated by 36 O.S. 1981 § 3636, the District Court, Cleveland County, Preston Trimble, Judge, gave summary judgment for the insurer. The Court of Appeals reversed. Upon insurer's petition, certiorari is granted.

OPINION OF THE COURT OF APPEALS VACATED; TRIAL COURT'S SUMMARY JUDGMENT AFFIRMED.

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For Appellants,
Randall Silver and Mikala Silver

Jim W. Lee, Esq.
Barry R. Davis, Esq.
Lee, Beuch and Davis,
Oklahoma City

For Appellee,
Farmers & Merchants Insurance Co.

OPALA, J.

The dispositive issue is whether the terms of 36 O.S. 1981 § 3636[1] impose an affirmative duty upon insurers to provide an

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[1]The pertinent terms of 36 O.S. 1981 § 3636 provide:

> "(A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state . . . unless the policy includes the coverage described in subsection (B) of this section.
>
> (B) The policy . . . shall provide coverage . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall not be less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes . . . provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured . . . .
> ***

explanation of uninsured motorist coverage [UMC] to the named insureds as an indispensable precondition for a statutorily effective rejection. We answer in the negative.

Randall and Mikala Silver [insureds or the Silvers] were named insureds of an automobile insurance policy with Farmers & Merchants Insurance Co. [insurer or Farmers], which was purchased in 1975. At that time Mikala Silver rejected uninsured motorist coverage for both her husband, Randall, and for herself by signing a statement which accompanied the insurance application.[2] The forms were believed to have been

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(F) The named insured shall have the right to reject such uninsured motorist coverage in writing, and except that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer." [Emphasis added.]

[2]The 1975 rejection form provides in pertinent part:

"* * *

REJECTION OF UNINSURED MOTOR VEHICLE INSURANCE COVERAGE

* * *

The undersigned insured (and each of them) has been offered Uninsured Motorist Coverage, in accordance with the law, and does hereby reject such coverage, and does not choose to pay the additional applicable premium.

The coverage (rejected) provides for the

filled out by the insurance agent on Randall's instructions.[3]

The next year they received by mail from the same agent another application for insurance and again opted to exclude UMC from the Farmers policy.[4] Before both insureds signed

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> protection of persons insured under this policy who would be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury, sickness or disease, including death resulting therefrom.
>
> This rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage."

[3]The agency status, within the meaning of 36 O.S. 1981 § 1423, of the person with whom the insureds dealt -- whether as agent of Farmers or of the Silvers -- is of no consequence to the outcome of the instant appeal. This is so because (a) as we analyze the insureds' claim, its gravamen is the Silvers' allegedly flawed UMC rejection rather than the insurer's fraudulent misrepresentation and (b) our holding today rests solely on the view that the provisions of § 3636 cast no affirmative duty upon insurers to provide an explanation of UM coverage as an indispensable precondition for a statutorily effective rejection.

Neither need we address here the question -- raised by the Silvers -- whether the trial court erred in severing for trial their claim against Farmers from that against the tortfeasors.

[4]The pertinent portions of the rejection form Randall and Mikala Silver signed in 1976 are:

* * *

UNINSURED MOTORIST COVERAGE
(OKLAHOMA)

the rejection statement, Randall allegedly telephone the agent's office for an explanation of UM coverage. He claims to have been told by an unidentified person that UMC covers only property damage caused by an uninsured motorist. It is asserted that relying on that answer, Randall signed the form, instructed his wife to do the same, and mailed it back to the agent. Randall allegedly relied upon this information about UMC when he once more signed a rejection statement five years later and authorized his mother to sign two others on his

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The Oklahoma Legislature passed House Bill 1198 amending Section 3636 of the Uninsured Motorist law. This law requires Insurance Companies to offer Uninsured Motorist limits not to exceed your present Bodily Injury Liability limits you now carry. Please express your intent and acknowledge this offer by the Company by checking only one of the appropriate boxes below:

___ I desire Uninsured Motorist Coverage for the same limits I now have on my policy.

___ I desire Uninsured Motorist Coverage (not to exceed my present Bodily Injury Liability limits) and will remit the proper premium therefore.

Urgent--If you check this option, contact your Agent for the amount of additional premium to remit to the Company.

___ I reject Uninsured Motorist Coverage in its entirety and agree that said rejection is to be continuous until a premium is paid for Uninsured Motorist Coverage.

APPENDIX B

behalf.[5]

In late 1983 the Silvers' minor child was killed when struck by an uninsured motorist. The insureds sued and took judgment against the driver for a sum that exceeds the aggregate limits of public liability coverage provided by

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[5]All total, three rejections were effectuated since 1976 on identical written applications for automobile insurance. One of these was signed by Randall Silver in 1981, and two were signed, in 1982 and 1983, by his mother as an admitted agent. The pertinent terms of those rejection statements are:

"* * *

PROTECTION AGAINST UNINSURED MOTORIST COVERAGE

It is agreed that Uninsured Motorist Coverage under the Oklahoma Uninsured Motorist Act, Section 3636, Oklahoma Statutes has been offered to the undersigned insured (and each of them) and

___ I desire Uninsured Motorist Coverage with limits of liability of $_____/_____ Bodily Injury (not to exceed limits of Bodily Injury of policy)

___ I reject Uninsured Motorist Coverage in its entirety

If Uninsured Motorist Coverage is rejected, the rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage.

* * *"

We need not and do not reach here the question whether § 3636 requires each named insured to reject UM coverage in writing, where more than one insured is named in a policy and at least one of them decides to reject UMC.

Farmers ($10,000.00 per person/$20,000.00 per occurrence) on each of three vehicles which were then owned by the Silvers. Admitting that UM coverage had been rejected and hence neither purchased nor included in any policy issued to them by Farmers, the Silvers nonetheless sued their insurer for UM benefits because of its failure to explain UM coverage to Randall Silver "properly, fully and adequately." They alleged Farmers is liable for all damages occasioned by their son's death because it failed to secure Randall's "knowing and intelligent" rejection of UMC.

Although, when urged to do so, the trial court refused to dismiss the claim, it postponed deciding whether the insureds had knowingly rejected UMC. After a hearing summary judgment was rendered for Farmers and the Silvers appealed.[6]

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[6]Neither the Silvers nor Farmers complains of procedural imperfections in the summary judgment process. The journal entry, which was signed by these parties' lawyers, indicates judgment was pronounced after "full file review and consideration of the briefs, deposition testimony, and affidavits." The absence from the record of a summary judgment motion is not fatal to the validity of the trial court's disposition because the terms of 12 O.S. Supp. 1984 § 2012(B) provide in pertinent part:

> ". . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by

Neither the legal theory of the Silvers' claim nor that on which the trial court rested its decision for Farmers is apparent from the record. If the trial court was correct under any theory this court's duty is to affirm the judgment.[7]

I

THE NATURE OF THE INSUREDS' CLAIM AGAINST FARMERS

The insureds' single pleading against Farmers is far more revealing in what it does not alleged than in what may be divined from its meager contents. Even though the Silvers averred that Farmers "improperly informed [Randall Silver] that [UMC] would only cover property damage if [the insureds] or their family members were involved in a collision with an uninsured motorist," they stated no common-law claim for bad

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the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment . . . ." [Emphasis added.]

[7]See Utica Nat. Bank and Trust v. Assoc. Prod., Okl., 622 P.2d 1061, 1066 [1981]. A pleader need not state the theory of recovery upon which he relies. Doss Oil Royalty Co. v. Texas Co., 192 Okl. 359, 137 P.2d 934, 939 [1943]; Oleck v. Fischer, 401 F.Supp. 651, 655 [S.D.N.Y. 1975].

faith, intentional misrepresentation or fraud.[8] They sought

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[8]The elements of a common-law action for fraud are: 1) a material misrepresentation, 2) knowingly or recklessly made, 3) with intent that it be relied upon, and 4) the party relying on the false statement suffers damages. Bras v. First Bank & Trust Co., Okl., 735 P.2d 329, 333 [1987]; D & H Co., Inc. v. Shultz, Okl. 579 P.2d 821, 824 [1978]. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." 12 O.S. Supp. 1987 § 2009(B).

An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence. Sokolosky v. Tulsa Orthopaedic, Etc., Okl., 566 P.2d 429, 431 [1977]; Onstott v. Osborne, Okl., 417 P.2d 291, 293 [1966]. "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he had been deceived by the vendor's misrepresentations." Nowka v. West, 77 Okl. 24, 186 P. 220 [1919] (syllabus).

The Silvers themselves described their claim in a brief to the trial court as follows:

> "Plaintiffs [the insureds] do not allege that the Defendant [Farmers] acted in bad faith or that somehow Defendant intentionally misrepresented the coverage and terms available . . . . Although the Defendant's misrepresentations cannot be said to have been intentionally fraudulent, the discussions resulting in the rejectment by Plaintiffs of uninsured motorist coverage were nevertheless flawed inasmuch as said representations induced reliance on the part of Plaintiffs, Randall and Mikala Silver on false and improper representations of material facts." [Emphasis added.]

At common law, states in a brief were not treated as admissions. Today, under 12 O.S. Supp. 1984 § 2012(B), supra

neither coverage based on breach of contract or estoppel nor rescission of their rejection on grounds of mutual mistake of law or of act.[9] Their theory was grounded solely upon a

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note 6, if materials dehors the pleadings are tendered for consideration on a motion to dismiss, summary judgment procedure must be utilized. McElearney v. University of Ill., Etc., 612 F.2d 285, 290 n. 3 [7th Cir. 1979]; United Steelworkers v. American Internat'l Aluminum Corp., 334 F.2d 147, 149 [5th Cir. 1964] (briefs); Judge v. Johnston Warren Lines, Ltd., 205 F.Supp. 700, 702 [D. Mass. 1962] (statements of counsel at oral argument); White v. Peabody Const. Co., Inc., 434 N.E.2d 1015, 1018-1019 [Mass. 1982] (statements of counsel at oral argument establishing admissions). See also Womack v. City of Oklahoma City, Okl., 726 P.2d 1178, 1181 n. 8 [1986], for the use of admissions in a brief on appeal.

[9]"A contract is extinguished by its rescission." 15 O.S. 1981 § 232. "A party to a contract may rescind the same in the following cases only:

> "1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.
>
> 2. If through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part.
>
> 3. If such consideration becomes entirely void from any cause.
>
> 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,
>
> 5. By consent of all the other parties." 15 O.S. 1981 § 233.

breached "duty to inform". They alleged Randall Silver "lacked the requisite informed consent to sign a rejection" of UM coverage as a result of Farmers' failure to inform him that UMC provides benefits in the event bodily injuries are sustained from the negligence of an uninsured motorist. If the claim so stated were legally cognizable under the breach-of-duty-to-inform theory, though questions of material fact would be present, the insureds might be entitled to recover at least the minimum statutory UM protection.[10]

The insureds' action against Farmers appears to be neither ex contractu nor ex delicto. Recovery under the theory of constructive fraud is also unavailable to them.[11] Insofar as the Silvers' suit was pressed to establish their demand for uninsured motorist protection mandated by § 3636, the gravamen of the claim was breach of some duty to explain UM coverage as a precondition to a statutorily effective

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[10]36 O.S. 1981 § 3636(A), (B), and (F), supra note 1; Moser v. Liberty Mut. Ins. Co., Okl. 731 P.2d 406, 408 [1987].

[11]The Silvers are precluded from recovery under the theory of constructive fraud, because their relationship with Farmers was stricto sensu at arms' length; they did not stand vis-a-vis each other in any recognized form of "special relationship." See Faulkenberry v. Kansas City Southern Ry. Co., Okl. 602 P.2d 203, 205 n. 2, 206 [1979].

rejection.[12]

II

36 O.S. 1981 § 3636[13] IMPRESSES NO AFFIRMATIVE DUTY UPON INSURERS TO PROVIDE AN EXPLANATION OF UMC TO NAMED INSUREDS AS AN INDISPENSABLE PRECONDITION FOR A STATUTORILY EFFECTIVE REJECTION

Insurance is a contract. 36 O.S. 1981 § 102.[14] The relationship between the insured and insurer clearly is contractual in nature,[15] and we find nothing in § 3636 that alters the traditionally commercial setting in which insurance policies are purchased. Our UMC statute creates no fiduciary obligations, and its scheme is not consistent with consumer

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[12]See Oklahoma Natural Gas Co. v. Pack, 186 Okl. 330, 97 P.2d 768, 770 [1940].

"Waiver" is the voluntary, intentional relinquishment of a known right. The person against whom waiver is asserted as a defense must have had full knowledge of the existence of his rights as well as of all the material facts upon which those rights depended. Faulkenberry v. Kansas City Southern Railway Company, supra note 11 at 206-207 [1979].

[13]For the pertinent text of 36 O.S. 1981 § 3636, see supra note 1.

[14]The terms of 36 O.S. 1981 § 102 are:

> "'Insurance' is a contract whereby one undertakes to indemnity another or to pay a specified amount upon determinable contingincies [sic]."

[15]Christian v. Metropolitan Life Ins. Co., Okl., 566 P.2d 445, 448 [1977].

protection laws.[16] Rather, the essence of § 3636 is regulatory.[17] Its object is to provide UM protection only for those who do not reject it in writing.

No challenge is made here either to the legal sufficiency of Farmers' offer of increased UMC limits[18] or to the insureds' opportunity to reject UM coverage entirely. As offeror, Farmers had no contractual duty voluntarily to explain the terms of its offer or the advantages and disadvantages to

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[16]See, e.g., the Uniform Consumer Credit Code, 14A O.S. 1981 §§ 1-101 et seq. Its purposes include 1) furthering "consumer understanding of the terms of credit transactions," 14A O.S. 1981 § 1-102(2)(c), and 2) protecting consumers from unfair practices, 14A O.S. 1981 § 1-102(2)(d). Legislative intent is achieved primarily through disclosure requirements. See 14A O.S. 1981 §§ 2-301 and 2-302. Consumers are entitled to rescind transactions when creditors fail to comply. See 14A O.S. 1981 § 5-204. To insure greater protection, waiver of rights under the UCCC is generally prohibited. 14A O.S. 1981 § 1-107(1).

[17]36 O.S. 1981 § 109; State v. Okl. State Bd. of Property. Okl., 731 P.2d 394, 401 [1987]; Winston-Norris Co. v. King, 119 Okl. 109, 249 P. 319, 320 [1926]. The terms of 36 O.S. 1981 § 109 provide:

> "No person shall transact a business of insurance in Oklahoma without complying with the applicable provisions of this Code [36 O.S. 1981 §§ 101 et seq.]."

[18]Insurers are required by 36 O.S. 1981 § 3636(B) to offer increased limits of UMC. For the pertinent text of § 3636(B) see supra note 1.

procuring UM coverage.[19] Nothing in § 3636 makes it necessary for an insurer to make an express offer to exclude UMC from its policy anterior to the named insured's decision to opt out of the mandated protection.[20] All that is required by § 3636 for an effective rejection is a writing signed by the named insured.[21] An initial rejection suffices to relieve insurers of their statutory obligation to include UMC in subsequent renewals, unless the named insured requested the omitted coverage in writing.[22]

There are three separate sources which give rise to the

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[19]Generally, an offer is sufficient if its acceptance and nothing further will result in an enforceable contract. See Davenport v. Doyle Petroleum Corporation, 190 Okl. 548, 126 P.2d 57, 60 [1942] and Fry v. Foster, 179 Okl. 398, 65 P.2d 1224, 1226 [1937].

[20]See Geisler v. Mid-Century Ins. Co., 712 S.W.2d 184, 187 [Tex.App. 1986].

[21]36 O.S. 1981 § 3636(F), supra note 1.

[22]36 O.S. 1981 § 3636(F), supra note 1. Material changes in "renewals" create "new" policies of insurance and thus make it incumbent upon insurers to procure new rejections. Beauchamp v. Southwestern Nat. Ins. Co., Okl., 746 P.2d 673, 676 [1987]. Neither here nor below did any party to this appeal raise the question whether the Silvers' applications for insurance were for new policies or renewals.

creation of rights under Oklahoma law.[23] In the context of this case, the general principles of contracts, insofar as they apply to insurance policies, are instituted not only by general statute,[24] but also by the Insurance Code itself.[25] The common law supplements our statutes. It remains in full force unless it is clearly and expressly modified or abrogated by our constitution or by statute.[26] Because § 3636 contains no language which alters the basic, arms' length nature of the insured-insurer relationship, we decline to read into the UM

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[23]See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 [1985]; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-578, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 [1972]; 12 O.S. 1981 § 2, infra note 26.

[24]See note 26, infra.

[25]See 36 O.S. 1981 § 102, supra note 15.

[26]12 O.S. 1981 § 2; Davis v. Davis, Okl., 708 P.2d 1102, 1111 [1985]; State Mut. Life Assur. Co. of Amer. v. Hampton, Okl., 696 P.2d 1027, 1036 [1985] (Opala, J., concurring). The terms of 12 O.S. 1981 § 2 provide:

> "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general Statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object." [Emphasis added.]

statute a duty charging insurers with the responsibility of detailed and formalistic explanation as an indispensable precondition for securing from the named insured a statutorily effective rejection of uninsured motorist coverage.[27] Where no duty exists, there can be no right.[28] Since Farmers stood obligated neither by contract nor by statute to apprise the insureds of all the facts about UMC, there was no right subject to waiver. We hold that no disputed material issue of fact came to be tendered below. Summary judgment must

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[27]To hold that insurers must give named insureds a judicially prescribed cluster of information as a prerequisite for a valid rejection would be to transpose their contractual relationship into one that requires Miranda-like treatment of insureds by their insurance providers. See Johnson v. Concord Mutual Insurance Co., 300 A.2d 61, 66 [Penn. 1973] (Pomeroy, J., concurring), citing Miranda v. Arizona, 383 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [1966].

[28]Hall Jones Oil Corporation v. Claro, Okl., 459 P.2d 858, 861-862 [1969]; Oklahoma Natural Gas Co. v. Pack, supra note 12. See also W. Hohfeld, Fundamental Legal Conceptions (1923) at 78, quoting from Leake, Law of Property in Land (1st ed., 1874) at 1-2:

> "'Rights against persons, jura in personam . . . have for their subject an act or performance of some certain determinate person, as the payment of money, the delivery of goods and the like. A right of this kind imports the correlative positive legal duty in the determinate person to act in the manner prescribed. It depends for its exercise or enjoyment upon the performance of that duty, and is secured by the legal remedies provided for a breach of performance . . . .'" [Emphasis theirs.]

hence be affirmed.[29]

The result reached today is not inconsistent with that portion of Hicks v. State Farm Mutual Automobile Insurance Company[30] which dealt with the validity of a named insured's UMC rejection.[31] When called upon to carry out the public

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[29]Today's holding is grounded on the conclusion that under the single theory of recovery found applicable to their claim, the Silvers cannot prove any set of facts that would have entitled them to relief against Farmers. See 12 O.S. Supp. 1984 § 2012(B)(6); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 [1957]; committee Comment to 12 O.S. Supp. 1984 § 2012. No harm resulted from the trial court's summary judgment disposition, because the evidentiary materials on record support its ruling.

[30]Okl., 568 P.2d 629, 633 [1977].

[31]In Hicks v. State Farm Mutual Automobile Insurance Company, supra note 30, as in the case at bar, there was no evidence of fraud; we held the rejection efficacious. That portion of Hicks which dealt with the issue whether the policy was a "renewal," has been overruled. See Beauchamp v. Southwestern National Insurance Company, supra note 22.

The parties to this appeal, as this court did in Hicks, refer to the Pennsylvania case, Johnson v. Concord Mutual Insurance Co., supra note 27, for the applicability of waiver to UMC rejections. We find Johnson inapposite here. There the insured sought reformation of his policy. The action was hence grounded on contract principles rather than on a breach of some statutory duty. We note also that the statute under scrutiny in that case has been amended. In Pennsylvania owners of automobiles for private use no longer have the right to reject UMC; that right is limited to owners and operators of commercial vehicles. See Johnson v. Concord Mutual Insurance Co., supra note 27 at 64, n.4.

policy mandate of our UM statute, this court has consistently respected the contractual nature of the insured-insurer relationship and the applicability of contract principles.[32] The rules of waiver and estoppel do not afford a gauge for measuring the efficacy of a UM rejection.[33] Like other jurisdictions before us, we refuse today to impose supra-statutory duties upon insurers by judicial fiat.[34]

COURT OF APPEALS' OPINION VACATED; TRIAL COURT'S SUMMARY JUDGMENT AFFIRMED.

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[32]See, e.g., Moser v. Liberty Mutual Insurance Company, supra note 10 at 410 n. 16; Uptegraft v. Home Ins. Co., Okl., 662 P.2d 681, 683 [1983]; Keel v. MFA Insurance Company, Okl., 553 P.2d 153, 155 [1976].

[33]See Dufresne v. Elite Insurance Company, 103 Cal.Rptr. 347, 353 [Cal.App. 1972].

[34]See, e.g., McCloe v. Utah Home Fire Ins. Co., 590 P.2d 941, 943 [Ariz.App. 1979] (Arizona's UM statute no longer requires that UMC "be called to the attention of the insured," and the right to reject UM coverage has been eliminated. See 1972 Ariz. Sess. Laws, Ch. 157, § 1.); Dufresne v. Elite Insurance Company, supra note 33; Drexler v. Georgia Farm Bureau Mut. Ins. Co., 320 S.E.2d 854, 857 [Ga. App. 1984]; Orolin v. Hartford Acc. & Indem. Co., 585 F.Supp. 97, 101 [N.D. Ill. 1984]; Brady v. Universal Underwriters Ins. Group, 307 N.E.2d 548, 551-552 [Ohio App. 1973]; cf. Dairyland Ins. Co. v. Kelley, 352 S.E.2d 174, 176 [Ga. App. 1987]; Geisler v. Mid-Century Insurance Company, supra note 20 at 186; accord, Martin v. 20th Century Ins. Co., 201 Cal.Rptr. 22, 27 [Cal.App. 1984]; but see, e.g., Patrick v. Cherokee Ins. Co., 512 A.2d 24, 27 [Pa. Super. 1986].

APPENDIX B

DOOLIN, C.J., and HARGRAVE, V.C.J., and HODGES, LAVENDER, SIMMS and SUMMERS, JJ., concur;
KAUGER, J., concurs in result;
WILSON, J., dissents.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child,	)	FOR OFFICIAL PUBLICATION
Plaintiffs-Appellants,	)	
vs.	)	No. 64,879
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants,	)	
and	)	
FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendant-Appellee.	)	

ALMA WILSON, Justice, dissenting:

The coverage termed "uninsured motorist coverage" is surely one of the most remarkable contractual undertakings ever devised, for uninsured motorist coverage does not insure uninsured motorists, (third parties); nor does it insure vehicles; rather, uninsured motorist coverage affords first-party coverage

to person(s) for whom the insurance contract is being written. It, thus, matches the complexity of the underlying policy and affords benefits on account of a wide variety of losses: medical expense, lost earnings, pain and suffering, including death. In this state, the indemnity language of uninsured motorist coverage, as mandated by 36 O.S. 1981 § 3636 is this:

> "The policy . . . **shall provide coverage . . .for the protection of persons insured** thereunder who are legally entitled **to recover** damages from owners or operators of uninsured motor vehicle and hit and run motor vehicles **because of bodily injury, sickness or disease, including death** resulting therefrom . . . ." [Emphasis added.]

There has been limited testing of the question how far the offeree must understand the terms of the coverage offered in order to decline it effectively. It has been held that the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation. Lopez v. Midwest Mutual Ins. Co., 223 So.2d 550 (Fla. App. 1969). This view comports with the rule in Oklahoma, as set forth in the early case of All American Bus Lines, Inc. v. Schuster, 199 Okl. 628, 189 P.2d 412 (1948), as follows:

> "Where a party signs a written agreement, in the absence of false representation or fraud, he is bound by it, although ignorant of its contents." [Emphasis added.

In the case now before this Court, Randall alleges that he telephone the agent's office for an explanation of uninsured motorist coverage. He further alleges that it was misrepresented to him that uninsured motorist coverage applies only to property damage caused by an uninsured motorist. He further averred that, relying upon the false explanation given to him, he signed the rejection statement which is the subject of this appeal. In my opinion, when Randall asked for the explanation about uninsured motorist coverage, it devolved upon the insurer to provide a complete and accurate explanation of uninsured motorist coverage, such that Randall would be able to make an intelligent and knowing decision whether to reject the coverage or not. Inasmuch as Randall's claims remained in controversy when the trial court granted summary judgment, the trial court erred in granting the insurer's motion for summary judgment at that time. Therefore, this Court should remand this case to the trial court to determine the factual issues raised by Randall's allegations.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 64,879
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants,	)	
and	)	
FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendant-Appellee.	)	

CORRECTION ORDER

The opinion by Opala, J., promulgated herein May 3, 1988, is hereby corrected as follows:

By striking at page 7 in footnote 16, on the 4th line from the top of the footnote, the following consecutive sentences:

> Legislative intent is achieved primarily through disclosure requirements. See 14A O.S. 1981 §§ 2-301 and 2-302. Consumers are entitled to rescind transactions when creditors fail to comply. See 14A O.S. 1981 §§ 5-204.

and substituting in their place the following text:

> Disclosure requirements are a primary means to achieve legislative intent. See, e.g., 14A O.S. 1981 §§ 2-301, 2-302 and 5-204.

In all other respects the opinion by Opala, J., shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 13th DAY OF MAY, 1988.

Acting Chief Justice

APPENDIX C

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

Division No. 3

RANDALL SILVER and MIKALA SILVER, Individually and as Parents and Next of Kin of Michael R. Silver, Deceased,	)	
Appellants,	)	
versus	)	No. 64,879
FARMERS & MERCHANTS INSURANCE CO.,	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE PRESTON TRIMBLE, JUDGE

Plaintiffs appeal trial courts [sic] order sustaining Insurance Company's motion for summary judgment finding policy did not provide for uninsured motorist coverage for Plaintiffs.

REVERSED AND REMANDED

Clifton D. Naifeh, and
Jeffrey A. Glendening,
Oklahoma City, Oklahoma, For Appellants,

Jim W. Lee,
Oklahoma City, Oklahoma, For Appellee.

Opinion by Carol M. Hansen, Presiding Judge:

APPENDIX C

The minor child of Randall and Mikala Silver (Plaintiffs) was struck and killed by an automobile driven by an uninsured motorist. Plaintiffs filed the present action for wrongful death and took a default judgment against the driver. In addition a jury returned a verdict against the owner of the vehicle, also uninsured, for $1,172,180.37 actual and $2,000,000 punitive damages. Prior to trial Plaintiffs amended their petition to include Farmers & Merchants Insurance Co., Appellees herein, (Insurance Company) seeking judgment against them for uninsured motorist coverage under three policies of insurance. Insurance Company answered denying coverage stating Plaintiffs had opted in their application to reject such coverage.

The trial was bifurcated. All issues against all defendants were tried except the issue of coverage under Insurance Company's policy. Subsequently the trial court granted Insurance Company's motion for summary judgment. Plaintiffs appeal that order.

Plaintiffs initially argue the trial court should not have bifurcated the trial but rather tried the liability of the other defendants in conjunction with the liability of Insurance Company for uninsured motorist coverage. This argument is clearly without merit. When there is no question of coverage

being applicable, and the only question is liability of the uninsured motorist and the amount of uninsured coverage, the Supreme Court allows an insured to join his insurance carrier as a party defendant.[1] However, joinder is certainly not compulsory. The right to recover under uninsured motorist coverage is based on the insured's right in contract rather than in the insured's right in tort against the motorist. Insurance Company is involved as a party to a contract not as the alter ego of the tortfeasor.[2] The issues involved in Plaintiffs' action against Insurance Company are totally different from those involved in the actual liability of the uninsured motorist.

In their petition Plaintiffs alleged at the time they purchased the policies from Insurance Company, its agent failed to inform them uninsured motorist coverage would cover Plaintiffs and their deceased son if damage was caused by an uninsured motorist or motor vehicle. They submit Insurance Company improperly informed them uninsured motorist insurance would cover only property damage in such an instance. They

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[1]Keel v. M.F.A. Insurance Company, 553 P.2d 153 (Okla. 1976).

[2]Bill Hodges Truck Co. v. Humphrey, 704 P.2d 94 (Okla. App. 1984).

alleged such failure properly and fully to inform them of the available coverage induced them to sign a rejection of such insured [sic] motorist coverage. Thus they lacked the requisite informed consent to sign the rejection. Because this information was not given them Plaintiffs submitted they were entitled to judgment against Insurance Company for damages.

36 O.S. 1981 §3636 provides in pertinent part:

> (A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.
>
> (B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom.
>
> . . . .
>
> (F) The named insured shall have the right to reject such uninsured motorist coverage in writing, and except that unless the named insured requests such coverage

> in writing such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

The purpose of an uninsured motorist provision in an insurance contract is to protect the insured from the effects of personal injury resulting from an accident with another motorist who carries no insurance.[3] The public policy intent espoused by the Legislature in the above statute is clearly expressed. Every automobile liability policy issued in this state must provide uninsured motorist coverage for persons insured thereunder.[4] Coverage may be rejected by the insured under this statute. However, such rejection in order to comport with the public policy expressed must be knowingly and voluntarily made.

By affidavit and deposition testimony, Plaintiff Randall Silver stated he first applied for insurance in 1976. Insurance Company's agent mailed him the forms. He stated he read the application but was unable to comprehend its meaning. He

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[3]Uptegraft v. Home Insurance Company, 662 P.2d 681 (Okla. 1983).

[4]State Farm Mutual Auto Insurance Company v. Wendt, 708 P.2d 581 (Okla. 1985).

called his agent and asked what uninsured motorist coverage meant. He stated he was informed by the agent that uninsured motorist insurance covered only property damage if family members or Plaintiffs were involved in a collision with an uninsured motorist. It was in reliance on that information that he signed the form and instructed his wife to do the same.

The initial form signed by Plaintiffs stated:

UNINSURED MOTORIST COVERAGE
(OKLAHOMA)

The Oklahoma Legislature passed House Bill 1198 amending Section 3636 of the Uninsured Motorist law. This law requires Insurance Companies to offer Uninsured Motorist limits not to exceed your present Bodily Injury Liability limits you now carry. Please express your intent and acknowledge this offer by the Company by checking only one of the appropriate boxes below:

___ I desire Uninsured Motorist Coverage for the same limits I now have on my policy.

___ I desire Uninsured Motorist Coverage (not to exceed my present Bodily Injury Liability limits) and will remit the proper premium therefore.
Urgent - - If you check this option, contact your Agent of the Company for the amount of additional premium to remit to the Company.

___ I reject Uninsured Motorist Coverage in its entirety and agree that said rejection is to be continuous until a premium is paid for Uninsured Motorist Coverage.

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After that time there was no further information provided. Plaintiffs had no further discussion with Insurance Company regrading uninsured motorist coverage. Each year they were mailed a new application. Plaintiffs did not read the documents but merely signed where told. In subsequent years and for different vehicles the rejection form changed to the following wording:

PROTECTION AGAINST UNINSURED MOTORIST INSURANCE

> It is agreed that Uninsured Motorist Coverage under the Oklahoma Uninsured Motorist Act, Section 3636, Oklahoma Statutes has been offered to the undersigned insured (and each of them) and
>
> ___ I desire Uninsured Motorist Coverage with limits of liability of $_____/_____ Bodily Injury (not to exceed limits of Bodily Injury of policy).
>
> _X_ I reject Uninsured Motorist Coverage in its entirety.
>
> If Uninsured Motorist Coverage is rejected, the rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage.

Insurance Company argues and the trial court apparently agreed the signed rejection form is binding as a matter of law and no question of fact may arise as to whether or not the rejection was intelligently and knowingly made. It is true,

APPENDIX C

absent unusual circumstances, an insured cannot claim ignorance of the contents of a contract he signed. Certainly an insured's signature on a rejection form raises a presumption he knowingly and intelligently rejected coverage. However, such presumption is not a conclusive presumption but rather a rebuttable one.

The fact Oklahoma statutes require uninsured motorist coverage be offered to every person buying automobile liability insurance and a written refusal is required to substantiate rejection of such coverage indicates a very clear legislative intent in favor of coverage.[5] In harmony with the view the statute evolves from public policy considerations, it must be broadly and liberally construed to accomplish this purpose.[6] As such parole evidence may be admitted to prove or disprove the rejection was knowingly and intelligently made.

The Supreme Court has addressed this problem in Hicks v. State Farm Mutual Auto Insurance Co., 568 P.2d 629 (Okla. 1977), cited by both parties in support of their views. In that decision the Supreme Court considered evidence leading up to

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[5]Chambers v. Walker, 653 P.2d 931 (Okla. 1982).

[6]Johnson v. Concord Mutual Insurance Company, 300 A.2d 61 (Penn. 1973).

the insured's signature rejecting uninsured motorist coverage. In Hicks the insurance company sent to Appellant for his signature the following instrument:

> "The Oklahoma Legislature had enacted legislation requiring all automobile liability insurance policies in the State to provide Uninsured Automobile Coverage (Coverage U) unless rejected in writing by the policyholder. This legislation also broadens the protection provided by Uninsured Automobile Coverage.
>
> "This coverage protects you in the event of bodily injury liability damages sustained by you, your family, or your passengers in an accident for which an unidentified or uninsured driver is legally liable. * * *
>
> "In accordance with the new law, State Farm is providing Uninsured Automobile Coverage for all Oklahoma auto liability policies. If you are not now carrying this coverage, your enclosed premium notice states: 'Coverage U Added' and indicates the limits of liability. The semi-annual premium for this additional coverage is $3.00 for $10,000/$20,000 limits or $2.70 for $5,000/$10,000 limits and is included in the total Amount Due. Payment of the total Amount Due automatically adds Coverage U to your automobile policy, effective with your policy's renewal date."

In the last paragraph of the explanatory statement the following language appeared:

> "If you presently do not have Coverage U, State Farm strongly recommends that you accept this important additional protection.

* * * * *

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"If You Want This
IMPORTANT COVERAGE

Pay the entire AMOUNT DUE shown on your Premium Notice and place this endorsement with your policy. This will automatically make Uninsured Automobile Coverage a part of your auto liability policy."

It further provided:

"If You Do Not Want
UNINSURED AUTOMOBILE COVERAGE . . .
Please follow these three steps:

1. Complete and sign the Notice of Rejection (at the right), and . . .

2. Subtract $2.70 from the total Amount Due on the enclosed premium notice if you have $5,000/$10,000 Bodily Injury Liability limits; $3.00 if you have $10,000/$20,000 Bodily Injury Liability limits;

3. Return the amount that is left as your premium payment enclosing your signed Notice of Rejection."

The notice of rejection also contained this language:

"NOTICE OF REJECTION
UNINSURED MOTORIST COVERAGE

"The undersigned, an insured named in the policy, hereby rejects the provisions covering damage caused by an uninsured motor vehicle under a policy of bodily injury liability insurance on the following described car: * * *."

The explanation included in Plaintiffs' policy application was in no way comparable to the express provisions of the Hicks policy as shown above. In Hicks as in this case Plaintiffs relied heavily on Johnson v. Concord Mutual

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Insurance Company, 300 A.2d 61 (Penn. 1973). The printed form containing the purported waiver of uninsured motorist coverage in Johnson was quite similar to the one contained in Insurance Company's application herein. The Hicks court distinguished Johnson but did not reject or disapprove its holdings. It found the Johnson policy did not contain the recommendation that the insured accept the tendered uninsured motorist coverage. Neither did the Johnson form provide an extensive explanatory statement as to what the insured was rejecting. Furthermore, in Hicks the Appellant signed the rejection, dated it and in conformity with an intent to reject the coverage subtracted the $3.00 charge for the uninsured motorist coverage from the total premium and returned it to the insurance company. The Hicks Court found nothing to indicate Appellant's signature on the rejection was not knowingly and intelligently made.

In the present case the rejection did not explain what uninsured motorist coverage was nor what it costs. Plaintiff testified Company's agent told him it was for property damage. There was no recommendation it be purchased and the cost was not mentioned. Whether the signature was intelligently and

voluntarily made is certainly a question of fact under these circumstances.

Because of the potential harsh ramifications of an election by an insured to refuse uninsured motorist coverage most courts have strictly and narrowly construed the requirement a waiver must be explicitly explained. A binding rejection of coverage must be based on such explanation.[7] In Maher v. All Nations Insurance Coverage, 340 NW.2d 675 (Minn. App. 1983) the Court held the issue of whether the insurer has made an adequate offer of uninsured motorist coverage to an insured is a question of fact. Such offer must be a meaningful one. The insured must be given enough information to make an intelligent decision. The Court voiced four basic concerns in determining whether the Insurance Company made a meaningful offer: 1) the method of the offer must be commercially reasonable; 2) the limits of the optional coverage must be specified, not merely offered in general terms; 3) the insurer must intelligently advise the insured of the nature of the

---

[7]Wilson v. National Indemnity Company, 302 So.2d 141 (Fla. App. 1974); Tibbals v. State Farm Mutual Auto Insurance Co., 370 NW.2d 679 (Minn. App. 1985); Johnson v. Concord Mutual Insurance Co., 300 A.2d 61 (Penn. 1973); Dufresne v. Elite Insurance Company, 26 Cal. App. 3d 916, 103 Cal. Rptr. 347 (1972).

optional coverage; and, 4) insurer must advise insured that the coverage is available at a relatively modest increase in premium. We find these concerns to be reasonable and direct the trial court to apply them to the present case.

The trial court erred in ruling as a matter of law there was knowing and informed rejection of uninsured motorist coverage by Plaintiffs. Their assertions clearly raise a question of fact. The trial court must conduct a case by case analysis of each instance. If there are facts in controversy these should be reviewed by the trier of fact to determine whether or not there was a knowing and informed rejection of uninsured motorist coverage. As in Johnson the clarity of the explanation of the coverage, the ability of the insured to comprehend the explanation, the amount of the premium, an the purpose of the coverage are all facts which must be considered in making this determination.

A review of the rejection forms signed by Plaintiff reveal very little information. The insured could either accept or reject uninsured motorist coverage. There was no explanation as to what was covered, no explanation as to why an insured might need uninsured motorist coverage, and no explanation as to the amount of coverage or the cost. Therefore, the only

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possible way Plaintiffs could have learned of their rights under this statute is from representatives of the Insurance Company. They stated no such explanation was given. Insurance Company argues the facts imply Plaintiffs rejected coverage. Plaintiffs claim the facts imply they did not. Clearly this is an issue of fact.[8] The record reveals facts supporting legitimate inferences favoring Plaintiffs well pleaded theory. The trial court's order granting Insurance Company's motion for summary judgment must be reversed.[9]

Accordingly, we REVERSE and REMAND FOR FURTHER PROCEEDINGS.

HUNTER, J. and BAILEY, J. concur.

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[8]See Wilson v. National Indemnity Company, supra, n.7.

[9]Crisp, Courtemanche, Meador & Associates v. Medler, 663 P.2d 388 (Okla. App. 1983).

APPENDIX C

APPENDIX D

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

JOURNAL ENTRY

On the 1st day of July, 1985, the above-captioned case came on for argument and consideration of defendant Farmers and Merchants Insurance Company's motion for summary judgment; the parties plaintiff were present by and through their attorney of record, Clifton D. Naifeh, and defendant Farmers and Merchants Insurance Company was present by and through its attorney of record, Jim W. Lee; said defendant had heretofore filed a motion to dismiss, which was overruled on June 4, 1985, with the Court reserving the issue of whether

plaintiffs made a knowing waiver of uninsured motorist coverages for submission upon stipulation, deposition, and briefs on July 1, 1985; that argument was presented, at the conclusion of which, after being fully advised in the premise, after full file review and consideration of the briefs, deposition testimony, and affidavits of the parties, and being fully advised in the premises, the Court found that the defendant, Farmers and Merchants Insurance Company's motion for summary judgment should be sustained, all with exceptions allowed plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that defendant Farmers and Merchants Insruance [sic] Company's motion for summary judgment should be and the same is hereby sustained, and that the judgments be placed of record in this case.

_____
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:

_____
Clifton D. Naifeh for the
Plaintiffs, Randall Silver
and Mikala Silver

Jim W. Lee for the Defendant
Farmers and Merchants
Insurance Company

APPENDIX D

No. 88-2001

FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

CORRECTED

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VOLUME II - APPENDICES E - I

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APPENDIX B

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

SECOND AMENDED PETITION

I.

On the 3rd day of November, 1983, the Plaintiffs' minor child, Michael R. Silver, now deceased, was walking in his neighborhood in a northerly direction along the east curb of Stubbeman Avenue, approximately 56 feet South of Ridge Road in Norman, Cleveland County, Oklahoma, when Christine Annette Slusher, driving a 1977 Pontiac Bonneville motor vehicle travelling on Stubbeman Avenue in a northerly direction

behind Michael R. Silver, failed to see the minor, Michael R. Silver, and caused the vehicle she was driving to violently strike Michael R. Silver causing fatally crushing bodily injuries to Michael R. Silver, his eventual death and the damages to the Plaintiffs.

II.

Michael R. Silver was a minor male child who would have been 13 years old on June 2, 1984, if he had lived until that date; he was at the time of his death residing with his parents, Randall Silver and Mikala Silver, in the City of Norman, Cleveland County, Oklahoma, and had resided with them during his entire lifetime.

III.

The Defendant, Christine Annette Slusher, also known as Christine Annette Stingley, is a resident of Canadian, Texas. The Defendant Ken Becknell is a resident of Cleveland County, Oklahoma. The Defendant, Ricky B. Henderson, is a resident of Cleveland County, Oklahoma. The Defendant, Farmers & Merchants Insurance Co. is an Oklahoma insurance company doing business in Cleveland County, Oklahoma. All transactions and occurrences occurred in the County of Cleveland, State of Oklahoma.

IV.

Plaintiffs allege that there has been no Personal Representative appointed for the Estate of Michael R. Silver, and that no probate procedure has been had upon said Estate; that these Plaintiffs are married, are now husband and wife, and are the surviving and next of kin of Michael R. Silver, deceased, and are the parties entitled to maintain and to prosecute this action as the next of kin; that Michael R. Silver had never been married and had left no issue.

V.

Plaintiffs allege that the Defendant Ken Becknell was the owner of the 1977 Pontiac Bonneville motor vehicle being driven by the Defendant Christine Annette Slusher. Defendant Becknell either knowing or having the ability to know that Defendant Slusher was a careless, reckless, and negligent driver, who had, upon prior occasions, been arrested, convicted and paid fines for traffic offenses and violations and that she was on this occasion under the influence of an intoxicant, negligently entrusted his vehicle to her and permitted her to drive it upon the public streets and highways of the City of Norman and that by reason thereof the Defendant Ken Becknell is guilty of carelessness and negligence to proximately cause

Plaintiffs' damage and the wrongful death of their child.

VI.

Plaintiffs further allege that the Defendant, Ken Becknell, was doing business under the name of Cowboy Country in Cleveland County. That Cowboy Country was at the time of this incident and all times pertinent hereto a club selling intoxicating liquors. That the agents, servants and employees of Ken Becknell furnished alcoholic beverages to Christine Annette Slusher until she became intoxicated and knowingly delivered and furnished alcoholic beverages to her subsequent to her intoxication, all immediately prior to her driving the vehicle entrusted to her by Ken Becknell and in violation of Section 537 of Title 37, Oklahoma Statutes (1981) which provides:

> No person shall: . . .
>
> (2) Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient.

By reason thereof, the Defendant Ken Becknell is guilty of carelessness and negligence to proximately cause Plaintiffs' damage and the wrongful death of Plaintiffs' child.

VII.

Plaintiffs allege that Defendant Ricky B. Henderson was a passenger in the 1977 Pontiac Bonneville motor vehicle being driven by the Defendant Christine Annette Slusher and owned by the Defendant Ken Becknell. Defendant Henderson was also under the influence of an intoxicant at the time of the automobile-pedestrian collision and negligently and carelessly failed to warn and remonstrate his driver regarding her lookout for the minor child; her observing the child upon the roadway; her maintaining her vehicle under reasonable control; her excessive speed; her utilizing the means at hand so as to prevent the motor vehicle from colliding and striking Michael R. Silver; her devotion of her time and attention to the operation of the motor vehicle; her careless method of operating the vehicle; her failure to sound a warning signal of her approach; her driving in a wanton and reckless manner without regard to the safety of any other person; her driving while under the influence of an intoxicant; her driving too close to the curbing; her driving in such a manner as to be unable to bring the vehicle to a stop within the assured clear distance ahead.

VIII.

Plaintiffs allege that Defendant, Christine Annette Slusher,

was guilty of carelessness and negligence at the time and place of this automobile-pedestrian collision to proximately cause the injuries and damages in the following particulars:

(a) She failed to keep a proper lookout for this minor child and other children that were likely to be in said street, which is located in a thickly populated section of the City of Norman where many small children reside, all of which was known or by the exercise of ordinary care should have been known by said Defendant;

(b) She failed to operate the vehicle she was driving with the proper precaution upon observing any child upon the roadway and in violation of Section 20-501(3) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> " . . . no driver shall operate a vehicle other than to: . . . (3) exercise proper precaution upon observing any child or confused or incapacitated individual upon the roadway."

(c) She failed to keep the automobile she was driving under reasonable control;

(d) She was operating the vehicle she was driving at a speed in excess of that which was reasonable and proper under the circumstances then and there existing, such circumstances being the residential nature of the street, other traffic upon the roadway and the presence of Michael R. Silver and in violation of Section 20-1004(a) of the Code of the City of Norman, Oklahoma, 1976, which provides:

"Notwithstanding the maximum speed limits enumerated in this Article, no person shall drive a vehicle upon any alley, highway, roadway, street, or public parking area at a speed greater than or less than is reasonable or prudent under the conditions then existing considering visibility, amount of traffic, condition of roadway surface, presence of pedestrians, obstruction of view, and other similar factors."

(e) She failed to employ the means at hand, such as the brakes and steering mechanism so as to prevent the motor vehicle she was driving from colliding and striking Michael R. Silver;

(f) She failed to devote her full time and attention to the operation of the motor vehicle she was driving so as to cause the collision;

(g) She failed to operate the vehicle she was driving as a careful and prudent operator of motor vehicles in that she failed to exercise that degree of care that a reasonable and prudent person would exercise in the operation of their vehicle under the circumstances without due caution or circumspection and at a careless, needless and dangerous rate of speed and in violation of Section 20-502 of the Code of the City of Norman, Oklahoma, 1976, which provides:

"No person shall operate a vehicle carelessly, without due caution and circumspection, or in a manner so as to endanger

or be likely to endanger any person or property."

(h) She failed to sound the horn or give any signal warning of her approach in an effort to avoid or warn Michael R. Silver and in violation of Section 20-501(2) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> ". . . no driver shall operate a vehicle other than to: . . .(2) give warning by sounding the horn when necessary . . ."

(i) She failed to exercise that care required to avoid colliding with a pedestrian upon the roadway and in violation of Section 20-501(1) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> " . . . no driver shall operate a vehicle other than to: (1) exercise due care to avoid colliding with any pedestrian upon any roadway. . ."

(j) She operated the vehicle she was driving in a wanton and reckless manner without regard for the safety of any person an din violation of Section 20-519 of the Code of the City of Norman, Oklahoma, 1976, which provides:

> "No person shall operate a vehicle wantonly, without regard for the safety of any person or property . . ."

(k) She operated the vehicle she was driving while under the influence of an intoxicant, and in violation of Section 20-526 of the Code of the City of Norman, Oklahoma,

1976, which provides:

> "No person shall operate a vehicle while under the influence of any alcohol, amphetamine, barbiturate, narcotic, marijuana, or other chemical which may render a person incapable of safely driving a vehicle, notwithstanding whether that substance was lawfully prescribed to that person."

(l) Defendant carelessly and negligently operated the vehicle she was driving too close to the curbing and thereby violently striking Michael R. Silver knocking him to the street.

(m) She failed to operate the vehicle she was driving in such a manner so as to bring the same to a stop within the assured clear distance ahead and in violation of Section 20-1004(b) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> "No person shall drive any vehicle upon a street at a speed greater than would permit him to bring it to a stop within the assured clear distance ahead."

IX.

As a direct and proximate result of the Defendants' negligence, the minor, Michael R. Silver, was injured and killed and these Plaintiffs were damaged, the extent of which is more specifically hereinafter set forth. The Plaintiffs allege that the

minor, Michael R. Silver, was without fault in the premises and the sole and proximate cause of the collision and resulting damages were the acts of negligence and want of due care exercised by the Defendants and each of them to make them jointly and severally liable to the Plaintiffs.

X.

Michael R. Silver was age 12 on the date of the collision and had a reasonable life expectancy of 57.9 more years. The blow from the vehicle caused Michael R. Silver to be thrown against the pavement causing him to suffer severe and fatally crushing bodily injuries. Plaintiffs' decedent survived the collision for a period of time and endured great and massive mental and physical pain and suffering until he died as a result of the collision entitling Plaintiffs to a judgment in the sum of $500,000.00. Plaintiffs have incurred medical and burial expenses for the care of their deceased child so as to entitle Plaintiffs to a judgment in the additional sum of $5,613.71. At the time of the injuries and death of Michael R. Silver, he was a strong, healthy, little boy and was an intelligent, loving and obedient son and would have rendered valuable services and support to the Plaintiffs. Michael R. Silver was gainfully employed and provided support to the family income. The

collision has destroyed the parent/child relationship and caused grief and loss of the companionship and love of the child to the Plaintiffs and their family. Plaintiffs witnessed the injuries to their son and have suffered great emotional distress therefrom. Plaintiffs have also suffered the loss of monies expended in support, maintenance and education of their child. Randall Silver, Mikala Silver, Kelly Silver, Matt Silver, Steve Silver and Susie Silver, are the only next of kin who have sustained a pecuniary loss by reason of the acts and omissions of the Defendants in the wrongful death of the minor child, Michael R. Silver, for which Plaintiffs are entitled to judgment in the additional sum of $3,000,000.00.

XI.

Plaintiffs allege that Defendant, Christine Annette Slusher, failed to stop the vehicle she was driving after striking the Plaintiffs' decedent and rendering all reasonable assistance to the injured child and further the Defendants, and each of them, secreted Christine Annette Slusher from the police, failing to inform them of the occurrence and location of the collision, all in violation of Section 20-301 of the Code of the City of Norman, Oklahoma, 1976, which provides:

(a) All drivers involved in an accident, whether

with another vehicle, private or public property, a pedestrian or singly, shall (1) immediately bring their vehicle to a stop; (2) render all reasonable assistance to any injured individuals, taking all reasonable steps to secure immediate medical attention for such injured person; (3) inform the police of the occurrence and location of the accident;

* * *

(c) After having complied with the appropriate above subsection, a driver may leave the scene of an accident if:

(1) Released by an officer of the City Police Department; or

(2) Such driver is required to make an immediate emergency run to the hospital for medical treatment of any person involved in the accident; or

(3) No person is either injured or killed and the total apparent damage to all vehicles or property involved in the accident is less than $100.00.

Plaintiffs allege that the acts of the Defendant, Christine Annette Slusher, in operating her vehicle at a high rate of speed in a residential district while in a drunken condition, illegally and in violation of the Ordinances of the City of Norman; the negligent entrustment of the vehicle to a person known or should have been known to have been intoxicated by Ken Becknell; and the failure of Defendant Henderson to remonstrate and warn and stop the Defendant Slusher from

operating her motor vehicle in the manner in which she was and in her intoxicated state was grossly negligent, and they maliciously, willfully, wantonly and intentionally committed said acts with reckless disregard for other persons on the streets of the City of Norman and specifically Plaintiffs' decedent; the Defendants, Christine Annette Slusher, Ken Becknell, and Ricky B. Henderson knew or should have known that the drunken and intoxicated condition of Christine Annette Slusher, might and would produce injuries to other persons such as pedestrians upon the streets of the City of Norman and that the conduct of leaving the accident scene without rendering assistance and reporting as required demonstrates a depravity so as to entitle Plaintiffs to a judgment for punitive, or exemplary damages, against the Defendants and each of them in the sum of $6,000,000.00.

XII.

At the time of the collision, the individual Defendants were uninsured motorists under the terms of the Statutes of the State of Oklahoma. Further, liability of these individual Defendants for the damages to the Plaintiffs are reasonably clear under the facts of this case and under the laws of the State of Oklahoma. At the time of the collision, Randall Silver

was the owner of three (3) motor vehicles on which he had purchased from Farmers & Merchants Insurance Co. three (3) policies of insurance, each of which provided $10,000.00 per person and $20,000.00 per occurrence liability coverage. Such policies were in full force and effect at the time of the collision herein. Plaintiff, Randall Silver, paid an additional premium for each of the motor vehicle policies. At the time Randall Silver purchased the insurance policies from the Defendant, Farmers & Merchants Insurance Co., the Defendant, Farmers & Merchants Insurance Co. failed to inform the Plaintiff that uninsured motorist coverage would cover Plaintiffs and their deceased son if damage occurred by an uninsured motorist or motor vehicle. Rather, said Defendant improperly informed Plaintiff, Randall Silver, that uninsured motorist insurance would only cover property damage if Plaintiffs or their family members were involved in a collision with an uninsured motorist. Such failure to properly and fully inform Plaintiffs as to the available coverage induced Plaintiff, Randall Silver, to sign a rejection of such uninsured motorist coverage. Due to the failure of Defendant, Farmers & Merchants Insurance Co., to properly, fully and adequately inform Randall Silver of the uninsured motorist coverage ,

Randall Silver lacked the requisite informed consent to sign a rejection of such coverage. Due to the failure of Defendant, Farmers & Merchants Insurance Co., to adequately and properly inform Randall Silver of the uninsured motorist coverage and the damages sustained by Plaintiffs and their decedent, and because of such insurance policies of the Defendant, and of the facts in this case, Plaintiffs are entitled to judgment against Farmers & Merchants Insurance Co. for all damages in the sum of $9,505,613.71.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in the sum of $9,505,613.71 plus interest thereon at the rate of fifteen percent (15%) per annum from the date of commencement, together with costs and such other and further relief that the Court may deem just and proper.

CLIFTON D. NAIFEH
470 Sooner Federal Building
Norman, Oklahoma 73069
(405) 329-2732

ATTORNEY FOR PLAINTIFFS

ATTORNEY'S LIEN CLAIMED.

CERTIFICATE OF MAILING

I certify that on the _____ day of _____, 1984, a true and correct copy of the above and foregoing SECOND AMENDED PETITION was mailed, postage prepaid, to: Mr. Coy H. McKenzie, 209 S. Crawford Avenue, Norman, Oklahoma 73069, Attorney for Defendant Ken Becknell.

_____
CLIFTON D. NAIFEH

APPENDIX E

APPENDIX F

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

A N S W E R

For answer to plaintiffs' second amended petition filed herein, defendant, Farmers and Merchants Insurance Company alleges and states:

1.

Defendant specifically denies each and every allegation concerning uninsured motorist coverage, affirmatively states that plaintiffs had no uninsured motorist coverage with this defendant at the time of the accident in question, and demands strict proof thereof.

3.

Defendant denies all of the allegations concerning failure to inform plaintiffs concerning uninsured motorist coverage, states that plaintiffs were properly informed and made an informed rejection of uninsured motorist coverage, and demands strict proof to the contrary.

WHEREFORE, having fully answered, defendant Farmers and Merchants Insurance Company prays that the plaintiffs take nothing by reason of their second amended petition filed herein and that they be dismissed hence with their costs.

LEE, BEUCH, DAVIS, BARNETT
AND DUROCHER

By _____
Jim W. Lee (OBA #5336)
P. O. Box 44188
Oklahoma City, Oklahoma 73144
Phone: 405/691-8573

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing ANSWER was mailed this _____ day of December, 1984, to the following counsel of record:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

MOTION TO DISMISS

Defendant, Farmers and Merchants Insurance Company, moves this Honorable Court to dismiss this action as to it, and for its reasons would advise this Court as follows:

1.

There is no justifiable cause of action against this defendant and in favor of the plaintiffs under the laws of the State of Oklahoma.

The testimony of plaintiffs, by deposition, and the evidence of documentation in defendant's file reveals that plaintiffs have consistently rejected uninsured motorist coverage from at least 1975 to date, and to and after the date of the incident giving rise to this lawsuit, and that such rejections are in the form of written, signed rejection of coverage.

WHEREFORE, defendant prays that this Court dismiss plaintiffs' action against this defendant and that this defendant be awarded costs and attorneys' fee by reason of having to defend plaintiffs' abuse of civil process and defendant's being required to defend a groundless action.

Respectfully submitted,

LEE, BEUCH, DAVIS AND DUROCHER

By_____
Jim W. Lee (OBA #5336)
Attorney at Law
P. O. Box 44188
Oklahoma City, Oklahoma 73144

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing MOTION TO DISMISS was hand delivered to the following counsel of record this 3rd day of June, 1985:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant respectfully submits to this Honorable Court that plaintiffs have no cause of action against it under the laws of the State of Oklahoma, and further advises this Honorable Court that plaintiffs have consistently rejected uninsured motorist coverage since at least 1975, as evidenced by plaintiffs' own testimony and the attached exhibits from defendant's underwriting file, marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," and "Exhibit E."

Plaintiffs were originally insured with Dairyland Mutual Insurance Company, then with State Farm Insurance Company, and finally with defendant Insurance Company.

When asked if plaintiffs carried uninsured motorist coverage with Dairyland Mutual Insurance Company, plaintiff Randall Silver responded at Page 32 of his deposition, beginning at line 5, as follows:

"Q Okay. When were you insured with Dairyland Mutual?

A When I was about age sixteen.

Q For how long, sir?

A Two or three years as far as I know. I can't remember for sure.

Q Did you have uninsured motorist coverage with them?

A Not that I recall."

When asked if he had uninsured motorist coverage with State Farm Insurance Company, plaintiff responded at page 36, line 17, as follows:

"Q All right. Do you ever recall having uninsured motorist coverage with State Farm?

A Not that I recall."

Plaintiffs, Randall Silver and Mikala Silver, have consistently requested and received the minimum State liability insurance coverage requirement so that they could legally drive their vehicle under the laws of the State of Oklahoma. When asked regarding the type of coverage requested from this defendant, plaintiff Mikala Silver testified, at page 12, beginning with line 10 in her deposition, as follows:

"Q All right. And did you go over the policy coverage with the agent while you were there at his office and did he explain to you what he had done so you knew for sure it was what you-all wanted?

A I don't recall.

Q Well, Mrs. Silver, would you normally go somewhere and pay for something if you weren't sure that it was what you wanted?

A Not usually.

Q Well, wouldn't it be fair to presume, if you don't recall, that you were satisfied that what you got was what you asked for?

A Yes, sir.

Q All right. Do you remember what you asked for other than State minimum coverage to allow you to drive the care under the State law?

A To the best of my recollection that is what we asked for."

Continuing in her deposition at page 19, plaintiff Mikala Silver, testified as follows:

"Q All right. Now, Mrs. Silver, at any time during the time that you-all had insurance with Farmers & Merchants Company, at any time during that time did you have any conversation with anybody, an insurance company agent, an independent agent that sold you the policy, a lawyer, a preacher, or anybody about what was the coverage you had?

A No, sir.

Q So, would it be fair to say that as far as you know the coverage that you had on your cars was the minimum required coverage and that's all and you never inquired about anything else about your coverage; is that right?

A That's right."

Plaintiff Mikala Silver testified that she read the insurance policy and documents which she signed and which were signed by her husband. At page 18 of her deposition, beginning at line 10, plaintiff Mikala Silver testified as follows:

"Q (By Mr. Lee) Did I understand you to say that you had read the policies?

A (No answer)

Q Read through the policies?

A I skimmed through them, yes."

Q All right. And I also understood you to say that you have seen those documents and read through the documents that your husband previously identified. (Attached Exhibits B, C, D, and E.) That is what you have testified to already. Is that correct?

A Yes, sir.

Q All right. And you realized from reading through those documents that you were rejecting uninsured motorist coverage.

Is that correct?

A To the best of my knowledge, yes, sir."

The Court is respectfully referred to attached "Exhibit A," which is a REJECTION OF UNINSURED MOTORIST VEHICLE INSURANCE COVERAGE, obtained by independent agent Jack A. Moss and pretaining [sic] to Policy No. A418111, effective December 8, 1975, and signed by insured, Mikala M. Silver. That document provides in part, as follows:

> "The coverage (rejected) provides for the protection of persons insured under this policy who would be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury, sickness or disease, including death resulting therefrom. (Emphasis provided)

The Court is also respectfully referred to "Exhibits B, C, D and E," which are signed rejections of uninsured motorist

coverage. The signed rejections have a place for the insured to mark that uninsured motorist coverage with limits of liability for bodily injury is desired, or that uninsured motorist coverage is rejected. The plaintiffs herein have consistently rejected uninsured motorist coverage as evidenced by the signatures of plaintiff Mikala M. Silver, Randall Silver, and Mrs. Geraldine Silver, mother of plaintiff Randall Silver.

The Supreme Court of the State of Oklahoma has held in the case of National Fire Insurance Company of Hartford v. McCoy, 239 P.2d 428, in the syllabus by the Court, that:

> "2. A contract in writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance."

The Court further provided, in Syllabus No. 1, that:

> "1. To justify change in written contract on the ground of mutual mistake, proof is required that written instrument does not express real contract, and that error, if any, was occasioned through mistake that was mutual, and evidence must be clear, satisfactory, free from doubt, and show that party who seeks reformation was free of neglect in making of agreement."

Plaintiffs herein have consistently rejected uninsured motorist coverage and have signed a rejection slip which describes the coverage which they have rejected. They have further consistently requested coverage from an independent insurance agent, not a policy-writing agent, but their own agent, not an employee of this defendant, which provided only the minimum required liability coverage under the laws of the State of Oklahoma and they have not ever, at any time, requested uninsured motorist coverage until after the incident giving rise to this lawsuit occurred.

All the evidence in this case is that the policy written by this defendant and carried by the plaintiffs was the policy that plaintiffs wanted and intended to carry and did not have any uninsured motorist coverage. The plaintiffs have never asked for nor have they ever paid for uninsured motorist coverage.

In the case of C.R. Wright and G. L. McKinney, co-partners, doing business as Wesco Insurance Agency, a fictitious partnership, Plaintiff, v. Hartford Accident and Indemnity Company, a corporation, Defendant, 258 F.Supp. 841 (1966), United States District Court for the Western District of Oklahoma case, Judge Daugherty, the Trial Judge, held that:

> "Liability insurer had no liability to insured for property damage liability claim where it had not been asked for and had not agreed to property damage coverage until after loss involved." (Emphasis added.)

The Court went on to say that:

> "Insured who orders property damage liability coverage from agency, which fails to procure coverage, can recover from agency for this negligence or other breach of duty upon insured's incurring liability for property damage loss."

In the case before this Court for review, the insureds' independent agent was an agent of the insured and not an employee, policy-writing agent, with authority to bind, of this defendant. This defendant received applications from insured's agent and wrote or rejected policies of insurance based upon those applications. These insureds, plaintiffs herein, had no insurance coverage for uninsured motorist benefits at the time the incident giving rise to this lawsuit occurred. If the agent failed to properly inform the insureds, which is not admitted but is specifically denied, but for purposes of argument is suggested, then, plaintiffs may have a cause of action against an agent who failed to properly inform them or write proper coverage. Under no circumstances do these plaintiffs have a cause of action against this defendant under the laws of the

State of Oklahoma, the testimony of the plaintiffs themselves or the evidence in this case.

Therefore, defendant respectfully submits that the Motion to Dismiss should be sustained and that they should be awarded costs, expenses and attorneys' fees in a reasonable amount to be determined by the Court.

Respectfully submitted,

LEE, BEUCH, DAVIS AND DUROCHER

By_____
Jim W. Lee (OBA #5336)
P. O. Box 44188
Oklahoma City, Oklahoma 73144
Phone: 405/691-8573

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS was hand delivered this 3rd day of June, 1985, to the following counsel of record:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

APPENDIX H

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER, a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF REQUEST FOR TRIAL BY JURY

FACTS

The material facts of the above-styled action are as follows:

1. The decedent, Michael R. Silver, was struck and killed on the 3rd day of November, 1983, by the acts of gross negligence of the Defendant Christine Annette Slusher Stingley, and Defendant Ken Becknell, the driver and owner, respectively, of the offending vehicle. The Court has directed a verdict against Ms. Slusher and a jury had returned a verdict against Mr. Becknell.

2. Plaintiffs requested a jury trial against Farmers & Merchants Insurance Co. concurrent with that of the co-Defendants.

3. The Court, upon the Defendant's Motion to Bifurcate, sustained such Motion and ordered a separate trial.

4. The day after the jury verdict and the Judge directed a verdict, the Plaintiffs and Defendant Farmers & Merchants Insurance Co. returned to docket call of the same jury term and were informed by the trial court that the remaining issue was a matter of law and was to be tried to the Court which was set over for hearing on June 4, 1985, at 1:30 p.m. to which ruling Plaintiffs except.

5. On June 4, 1985, at 1:30 p.m., the Court, after conference with the parties, determined that the matter should be submitted upon Stipulation and/or briefs to which the Plaintiffs duly excepted having again requested a trial by jury.

6. This matter now comes before the Court upon the issue of whether there was a knowing rejection by the policyholder of uninsured motorist coverage.

7. At the time of the collision, Plaintiff, Randall Silver, parent of the decedent, was the owner of three (3) motor vehicles for which he purchased three (3) policies of insurance from the Defendant, Farmers & Merchants Insurance Co., each

policy providing $10,000.00 per person and $20,000.00 per occurrence liability coverage.

8. At the time said policies were purchased, Defendant Farmers & Merchants Insurance Co., failed to inform the Plaintiff that uninsured motorist coverage would cover the Plaintiffs and their deceased son for damages on account of bodily injuries or death occasioned by an uninsured motorist or motor vehicle. Defendant Farmers & Merchants Insurance Co. instead improperly and negligently informed Plaintiff that uninsured motorist coverage would insure only property damage. Relying on said misrepresentations, the Plaintiff, Randall Silver, executed rejections of uninsured motorist coverage and directed his wife to do likewise. (See Affidavits of Randall R. Silver and Mikala Silverattached [sic] hereto and made a part hereof.)

9. Due to the failure by Defendant, Farmers & Merchants Insurance Co., to properly and adequately inform Plaintiff, Randall Silver, Plaintiff lacked the necessary requisite informed consent to sign rejections of such coverage.

10. Plaintiffs request trial by jury.

PROPOSITION I.

WHETHER AN INFORMED, KNOWING AND INTELLIGENT REJECTION OF UNINSURED MOTORIST COVERAGE HAS BEEN MADE

BY A POLICYHOLDER IS A QUESTION OF FACT FOR THE JURY TO DECIDE WHERE MISREPRESENTATIONS HAVE BEEN MAD BY THE INSURER.

ARGUMENT

Plaintiffs submit that there is no question that uninsured motorist coverage was, in fact, intended to be rejected as indicated by the signed waivers accompanying each of the Plaintiffs' policies. Plaintiffs assert, however, that such rejection(s) was not a knowing, informed and intelligent waiver and that said rejection was the result of misrepresentations and omissions by Defendant and its agent.

In Oklahoma, insurers are mandatorily required to offer uninsured motorist coverage and if the insured desires not to have uninsured motorist coverage, he must so indicate by signing a written rejection of such coverage. 36 OS. § 3636.

Oklahoma case law addressing the specific issues discussed herein is not extensive. Nonetheless, Hicks v. State Farm Mutual Automobile Insurance Company, 568 P.2d 629 (Okla. 1977), discusses almost the exact question raised in this matter, that being whether or not there was a knowing and intelligent waiver of uninsured motorist coverage.

In Hicks, supra, the Plaintiffs, the insureds, brought an action against the Defendant insurance company under their

uninsured motorist coverage even though Plaintiffs had rejected such coverage. The Plaintiffs therein asserted that the rejection of coverage was not knowing or voluntary and as such Defendant carrier should honor their claim. In ruling for the Defendant, the Oklahoma Supreme Court held that:

> Where insurer mailed the insured a proposed endorsement which, if it had been accepted, would have provided the insured with uninsured motorist coverage by payment of a small additional premium charge, the policy defined such coverage in language plain enough to enable the insured to comprehend the waiver of such coverage, the policy contains strong recommendation that the insured accept uninsured motorist coverage and that the insured signed the rejection of coverage, dated it, and mailed the proposed endorsement and rejection back to the insurer, insured's waiver of uninsured motorist coverage was knowingly and intelligently made.

In the instant case, there are several features which are distinguishable from Hicks, supra. First, there was never a strong recommendation made by the Defendant Farmers & Merchants Insurance Co. to Plaintiffs, Randall and Mikala Silver, regarding the implications of not accepting uninsured motorist coverage. The Defendant's representation to the Plaintiffs indicated to the Plaintiffs that uninsured motorist insurance would cover only property damage if either the Plaintiffs or members of their family were involved in an accident with an uninsured motorist and as such is tantamount to legal fraud. At no time were the Plaintiffs informed that

such coverage would also compensate them or the immediate members of their family for personal injury or accidental death occasioned by a collision with an uninsured motorist. Misfeasance by Defendant's agents resulted in a rejection of coverage which Plaintiffs may have otherwise accepted.

Plaintiffs do not allege that the Defendant acted n bad faith or that somehow Defendant intentionally misrepresented the coverage and terms available. Obviously, it would have benefited the Defendant by way of increased premiums, to include in Plaintiffs' policy uninsured motorist coverage. Although the Defendant's misrepresentations cannot be said to have been intentionally fraudulent, the discussions resulting in the rejectment by Plaintiffs of uninsured motorist coverage were nevertheless flawed inasmuch as said representations induced reliance on the part of the Plaintiffs, Randall and Mikala Silver on false and improper representations of material facts.

One of the definitions of actual fraud found in 15 O.S. §58(2) is "the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true." In this case, by virtue of Defendant's misstatement and omissions, Plaintiffs relied on advice and information which was incorrect, inconsistent and

detrimental to their best interest and that of their family. In fact, prior to the death of their child which precipitated this action, Plaintiffs were never informed as to the cost of uninsured motorist coverage nor did they even understand the true meaning and purpose of uninsured motorist coverage. Had the agent negotiating the policy not breached his fiduciary duty to fully inform and apprise the Plaintiffs, they could have exercised a rational, intelligent and purposeful election or rejection of coverage.

Second, in Hick, supra, there was no question involving misrepresentation or fraud. In that case a proposed endorsement was mailed to the Plaintiff defining coverage in "language plain enough to enable the insured to comprehend waiver of such coverage." In fact, the policy contained wording stating, "State Farm strongly recommends you accept this important additional protection." Hicks, supra. Plaintiffs, in the case at bar, as indicated earlier, were misinformed by the agent as to the definition of "uninsured motorist coverage." Policies were not mailed to Plaintiffs until after the rejections were endorsed. The ensuing rejection(s) was not knowingly or intelligently made.

In the Hicks, supra, decision, the Court in distinguishing Johnson v. Concord Mutual Insurance Co., 300 A.2d 61, (Pa.

1973), the case heavily relied upon by the Plaintiff therein, found Johnson distinct on two grounds. First, "the Johnson policy did not contain the strong recommendation that the insured accept the tendered uninsured motorist coverage," and, second, the policy "failed to provide an extensive explanatory statement as to what the insured was rejecting." Hicks, supra. Those factors discussed in Johnson which the Oklahoma Supreme Court therein found as important and nonexistent, likewise are nonexistent in the instant case. Simply stated, the Plaintiffs, Randall and Mikala Silver, could not have exercised a rational and intelligent rejection absent full disclosure by the Defendant Farmers & Merchants Insurance Co.

Implicit in the Hicks decision is the finding that had the Plaintiffs therein submitted the issue or claim of misrepresentation or fraud, a material fact would have been raised warranting trial by jury. Citing Brady Admx. v. Universal Underwriters Insurance Group, 307 N.E.2d 548 (Ohio, 1973), the Court in Hicks, supra, stressed that "there is no issue that the insured signed such rejection under duress or conditions showing undue influence. Neither s there a claim of misrepresentation." (Emphasis added.) By including that specific language, the Oklahoma Supreme Court indicates that had that particular issue been raised, a material question of

fact would have existed requiring resolution by a jury.

In his dissenting opinion in the Hicks, supra, Justice Doolin stated "that the Appellants by their pleadings have raised a question of fact, as to whether or not the deceased knowingly and voluntarily rejected coverage on the subsequent policy. To decide this question by summary judgment is to require the opponent of the motion to carry the burden of proof."

Plaintiffs submit that even though rejections of coverage were signed and returned to Defendant Farmers & merchants Insurance Co., the agreement created thereby had neither force nor effect since contractual consent by the Plaintiffs was lacking. Pursuant to 15 O.S. §53(5), "an apparent consent is not real or free when obtained through mistake." In O'Neal v. Harper, 75 P.2d 879 (Okla. 1938), the Court ruled that "there must be a meeting of the parties' minds on all essential elements before a contract is created." Clearly such mutual understanding did not exist between the parties involved herein. The purpose and intent envisioned by the Legislature by enacting Oklahoma's Uninsured Motorist Coverage Statute was to "provide protection against injuries suffered by reason of uninsured and financially irresponsible motorists." Hicks, supra.

The issue of whether an insurer has made an adequate offer of uninsured motorist coverage to an insured is a fact issue which must be resolved by the trier of fact. Maher v. All Nation Insurance Co., 340 N.W.2d 675 (Minn. App. 1983).

CONCLUSION

By virtue of Defendant Farmers & Merchants Insurance Co.'s fiduciary duty with the Plaintiffs, the burden of full disclosure rested upon any party acting on behalf of the Defendant. The representations made to the Plaintiffs with respect to uninsured motorist coverage were insufficient to allow a knowing, rational, and intelligent choice regarding acceptance or rejection of such coverage. Any assertion by Defendant that the written rejections of coverage contained in Plaintiffs' policies conclusively indicates a rational, intelligent and knowing choice, overlooks the question or issue as to how or under what circumstances such rejections were obtained. In view of the Plaintiffs' allegations with respect to the nonexistence of a knowing and intelligent waiver, it would be fundamentally inappropriate to dispose of this matter absent determination of liability by a jury.

WHEREFORE, premise considered, Plaintiffs respectfully urge this Honorable Court to submit the issues raised herein for determination by a jury.

Respectfully submitted,

NAIFEH & WOSKA
A PROFESSIONAL CORPORATION

BY: _____
CLIFTON D. NAIFEH - OBA #6568
470 Sooner Federal Building
Norman, Oklahoma 73069
(405) 329-2732

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF HAND DELIVERY

I certify that on the 1st day of July, 1985, a true and correct copy of the above and foregoing PLAINTIFFS' BRIEF IN SUPPORT OF REQUEST FOR TRIAL BY JURY was hand delivered to: Mr. Jim W. Lee, Attorney for Defendant, Farmers & Merchants Insurance Co., and Mr. Coy H. McKenzie, Attorney for Defendant, Ken Becknell.

_____
CLIFTON D. NAIFEH

APPENDIX I

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

SILVER, PLAINTIFF

-vs- CASE NO. C-84-781T

FARMERS, DEFENDANT(S)

DATE: 4 June 85 Judge: T

Question of uninsured motorist to be submitted on stipulations and/or briefs 9 a.m. 1 Jul 85 Farmers M to D: OR

signed: PT

APPENDIX I

Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2001

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RANDALL SILVER AND MIKALA SILVER, INDIVIDUALLY AND AS PARENTS AND NEXT OF KIN OF MICHAEL R. SILVER, DECEASED, MINOR CHILD,

Petitioners,

v.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JIM W. LEE, COUNSEL OF RECORD
MANVILLE T. BUFORD (OF COUNSEL ON BRIEF)
LEE, BEUCH, BUFORD, DUROCHER & MAURITSON
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ATTORNEYS FOR RESPONDENT

JUNE, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

RANDALL SILVER and MIKALA SILVER, as parents and next of kin of MICHAEL R. SILVER, Deceased, Minor Child,	)	
Petitioners,	)	
vs.	)	Case No. 88-2001
FARMERS AND MERCHANTS INSURANCE COMPANY,	)	
Respondent.	)	

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OBJECTION TO JURISDICTION

Petitioners Randall Silver and Mikala Silver ("the Silvers") assert this Court's jurisdiction under the provisions of 28 U.S.C. §1257 authorizing their petition for certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States." Thereafter, the Silvers cite perceived entitlements--not

under the Constitution of the United States, nor, indeed, under its State constitutional counterpart--arising from the statutes of the State of Oklahoma and its courts' judicial construction thereof. Only passing reference is made to the federal and state constitutions and no authority is given that the proceedings before the courts of the State of Oklahoma were either (1) violative of due process or (2) involve a federal question. For reasons set forth hereafter, this Court should deny the Silvers' prayer for its assumption of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "*** nor shall any State deprive any person of . . .

property without due process of law; ****"

Title 36, Oklahoma Statutes 1981, §3636 (A) and (B) provides:

* * * *

"(A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.

(B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily

injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. The uninsured motorist coverage shall be upon a form approved by the State Board for Property and Casualty Rates as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor."

* * * *

STATEMENT OF THE CASE

For purposes of Respondent's position, the "Statement of the Case" set forth in the petition may be accepted by this Court as complete; however, it may be helpful to condense the proceedings

below as reflected by Petitioners' Appendices.

Under the provisions of 36 O.S. 1981, §3636, insurers issuing automobile insurance policies in the State of Oklahoma *must* include uninsured motorist coverage of limits equal to the statutory minimum required for liability coverage *unless* the named insured rejects the uninsured motorist coverage *in writing*. It is undisputed below that the Silvers rejected in writing the coverage on their policy of insurance with Respondent ("Insurer") and that written rejections continued for each policy renewal period since 1975.

By amended petition,[1] the Silvers, as plaintiffs, alleged in substance that, by reason of an alleged failure of Insurer to explain correctly and fully

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[1]Petitioners' Appendix E, pp. 13-15.

the provisions of uninsured motorist insurance coverage to the Silvers, the Silvers rejected the coverage and, some eight years later, learned that the rejection had been improvident when their son was tragically killed in 1983 by an uninsured motorist. The Silvers assert, however, that the incorrect information allegedly given to them resulted in a lack of "informed consent to sign a rejection of such coverage."[2]

On the issue of whether the Silvers had made a "knowing waiver of (uninsured motorist) insurance coverage," the trial court found in favor of the Insurer upon a motion for summary judgment.[3]

The Silvers appealed to the Oklahoma Supreme Court which assigned the cause to Division No. 3 of the Oklahoma Court of

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[2]Petitioners' Appendix E, pp. 14-15.

[3]Petitioners' Appendix D, pp. 1-2.

Appeals for review.[4] The Court of Appeals held that "(t)he trial court erred in ruling as a matter of law there was a knowing and informed rejection of uninsured motorist coverage" by the Insurer and remanded the cause for trial.[5]

The Oklahoma Supreme Court assumed original jurisdiction and issued certiorari to the Court of Appeals to consider the issue ". . .(W)hether the terms of 36 O.S. 1981 §3636 impose an affirmative duty upon insurers to provide an explanation of uninsured motorist coverage (UMC) to the named insureds as

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[4]Under Oklahoma law, appeal is filed in the Oklahoma Supreme Court which may then assign the cause to a subordinate Court of Appeals. See, generally, Art. 7, §§1, 4, Okla. Const., 20 O.S. 1981, §30.1, 12 O.S. 1981, §952.

[5]Petitioners' Appendix C, p. 13-14.

an indispensable precondition for a statutorily effective rejection."[6]

The Oklahoma Supreme Court, in its opinion issued in May, 1988,[7] and corrected in February, 1989,[8] held that the language of §3636 imposed no such duty on the insurer[9] and, accordingly, the judgment of the trial court was affirmed.

ANALYSIS OF THE QUESTION PRESENTED

Although phrased in due process language, the Silvers pose the question whether the Oklahoma Supreme Court was arbitrary (1) in failing to follow the Oklahoma Pleading Code and (2) in failing to interpret the Silvers' initial

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[6]Petitioners' Appendix B, pp. 2-3.

[7]Petitioners' Appendix B, pp. 1 et seq.

[8]Petitioners' appendix A, pp. 1 et seq.

[9]Petitioners' Appendix, pp. 15-16.

petition as stating a cause of action in fraud.

No matter how one rearranges the words and phrases used in the Silvers' Petition for Certiorari, the result is the same, i.e., that the Silvers complain that the Oklahoma Supreme Court erred in construing Oklahoma law. Accordingly, this Court should determine itself to be without jurisdiction to alter the rulings below.

ARGUMENT

PETITIONERS PRESENT NO BASIS ON WHICH THIS COURT MAY GRANT THEM RELIEF.

Petitioners assert a denial of due process by reason of a perceived arbitrariness of the State courts in the consideration of their claim for uninsured motorist coverage. The Silvers alleged in their petition to the trial

court in substance that Oklahoma statutes required of an insurer a duty of proper, adequate and full explanation to an insured of the nature and scope of uninsured motorist coverage prior to permitting its insured to reject such coverage.[10] Instead, the Silvers alleged, the Insurer in this case, gave an incorrect explanation which is *now* said by the Silvers to constitute a species of fraud. The trial court disagreed and granted judgment as a matter of Oklahoma law on the issue of a "knowing waiver" of coverage.[11] The Court of Appeals disagreed and opined that Oklahoma law, specifically §3636 *supra.*, imposed with the trial court a duty upon an insurer for explicit explanation of the coverage waiver and whether a waiver was knowingly

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[10]Petitioners' Appendix E, pp. 13-15.

[11]Petitioners' Appendix D, pp. 1-2.

and voluntarily made became a question of fact.[12] The Oklahoma Supreme Court reversed the Court of Appeals and reinstated the decision of the trial court. The Supreme Court ruled that §3636 imposed no affirmative duty of explanation of uninsured motorist coverage as a precondition to waiver,[13] that without an insurer duty to explain the Silvers had no right to explanation,[14] and that no cause of action in fraud was available under Oklahoma law under the facts adduced in this case.[15]

A. *The Issues Treated Below, Grounded in State Law, Provide No Basis for Assumption of This Court's Jurisdiction.*

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[12]Petitioners' Appendix C, pp. 11-13.

[13]Petitioners' Appendix B, pp. 3, 16.

[14]Petitioners' Appendix B, p. 16.

[15]Petitioners' Appendix B, pp. 8-9, and footnote 8; Petitioners' Appendix A, p. 1-2, amended footnote 11.

This Court has not historically entertained constitutional questions in advance of strict necessity. See, e.g., *Parker v. Los Angeles County*, 70 S.Ct. 161, 338 U.S. 327, 94 L.Ed. 144 (1949); *Rescue Army v. Municipal Court*, 67 S.Ct. 1409, 331 U.S. 549, 91 L.Ed. 1666 (1947). Moreover, where the issues presented are intertwined with the application of State law--the constitutionality of which is not at issue--the exercise of this Court's jurisdiction is not warranted. *Duncan v. Tennessee*, 92 S.Ct. 785, 405 U.S. 127, 31 L.Ed.2d 86 (1972).

In the instant case, the Silvers do *not* allege that the statutes cited in their Petition are repugnant to the Constitution, *or* that the statutes created an unconstitutional class and placed them within such class, *or* that constitutional statutes were

unconstitutionally applied to them so as to deny Petitioners unequal protection, *or* that they were denied access to the full panoply of judicial process afforded the citizens of the State of Oklahoma under its constitution and laws.

What the Silvers do contend is that the Oklahoma Supreme Court (1) was too restrictive in its interpretation of the Oklahoma Pleading Code,[16] and (2) improperly applied its own court rules relating to summary judgment.[17]

By reason of alleged accumulated error in construing Oklahoma law, the

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[16]Petition, Subproposition A, pp. 8 et seq., Subproposition B, pp. 11 et seq.; Subproposition C, pp. 22 et seq., Subproposition E, pp. 26 et seq.

[17]Petition, Subparagraph D, pp. 24 et seq. Petitioners cite "Rule 13" as a federal rule, *see* Table of Authorities, p. viii; Rule 13, Rules of the Supreme Court for the District Courts of Oklahoma, 12 Okla. Stat. Ann., CH. 2, App. is substantially equivalent to Rule 56, Fed.R.Civ.P.

Silvers now claim that they were effectively denied their day in court. Indeed, as phrased by the Silvers, they were denied due process "by impact" of the Oklahoma Supreme Court ruling.[18] Phrased another way, the Silvers lost their claim for insurance coverage for which they neither contracted nor paid.

The decision of the Oklahoma Supreme Court construing Oklahoma laws, i.e., the Pleading Code, Supreme Court rules of procedure, the Insurance Code, etc., is binding on the courts of the United States, *Leeper v. Texas*, 11 S.Ct. 577, 139 U.S. 462, 35 L.Ed. 225 (1891); *Central Land Co. of W. Virginia v. Laidley*, 16 S.Ct. 80, 159 U.S. 103, 40 L.Ed. 91 (1895), and this Court should decline to review it.

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[18]Petition, p. 30.

B. An Erroneous Decision Below Does Not Equate to an Absence of Due Process

Respondent does not question the Silvers' generalized claim of entitlement to due process of law under the Fourteenth Amendment but states that all process that they were due was afforded in this highly contested legal proceeding that covered the years 1984 through 1989. No deficiencies of notice or rights to be heard are alleged. The Silvers appeared at all stages of the proceedings below and argued their cause at length. They lost the argument; they disagree with the Oklahoma Supreme Court's decision; they now seek another forum to correct their perceived errors in the construction of state law.

The due process clause of the Fourteenth Amendment does not incorporate the constitution and laws of the States

but leaves the States free to adopt, interpret and enforce their statutes and common law doctrines as each sees fit. *Buchalter v. People of the State of New York*, 63 S.Ct. 1129, 319 U.S. 427, 87 L.Ed. 1492 (1943). Even if the courts below were erroneous as a matter of law, a constitutional deprivation does not result,, *U.S. v. Ragen*, 247 F.2d 638 (7th Cir., 1959), cert. den. 78 S.Ct. 276, 355 U.S. 900, 2 L.Ed.2d 197, no matter how material the errors of the State courts may be. *Buchalter v. People of the State of New York, supra.*, at 319 U.S. 431.

The constitutional validity of the Oklahoma statutes cited by the Silvers is not challenged here and was not challenged below. Only the Oklahoma Supreme Court's construction of those statutes is at issue. As phrased in

Central Land Co. of W. Virginia v. Laidley, supra.,[19]:

* * * *

> "If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the state has erred in its construction of the statute."

* * * *

Moreover, the Court in *Central Land Co.* concluded:[20]

* * * *

> "When the parties have been fully heard in the regular course judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the constitution of the United States."

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[19]16 S.Ct. at 82, 159 U.S. at 110.

[20]16 S.Ct. at 83, 159 U.S. at 112.

* * * *

CONCLUSIONS

For reasons stated, the Petition for Certiorari filed herein should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, JIM W. LEE, Counsel of Record for Farmers and Merchants Insurance Company, Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of June, 1989, I served a copy of the foregoing *Brief in Opposition to Petition for Certiorari* to the Supreme Court of the United States on Randall and Mikala Silver, the Petitioners herein, by delivering a copy thereof to Rex K. Travis, Esq., Counsel of Record for the Petitioners, at his office located at 100 Colcord Building, 15 North Robinson, Oklahoma City, Oklahoma 73102.

JIM W. LEE

Supreme Court, U.S.
FILED
SEP 13 1989
JOSEPH F. SPANIOL
CLERK

(5)

Case No. 88 - 2001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

NAIFEH & WOSKA
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ATTORNEY FOR PETITIONERS

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I. THE UNITED STATES SUPREME COURT HAS INDEPENDENT SUBJECT MATTER JURISDICTION WHEN DUE PROCESS IS VIOLATED BY THE OKLAHOMA SUPREME COURT'S ARBITRARY AND UNCONSTITUTIONAL APPLICATION OF A STATE PROCEDURAL LAW

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PROPOSITION

THE UNITED STATES SUPREME COURT HAS INDEPENDENT SUBJECT MATTER JURISDICTION WHEN DUE PROCESS IS VIOLATED BY THE OKLAHOMA SUPREME COURT'S ARBITRARY AND UNCONSTITUTIONAL APPLICATION OF A STATE PROCEDURAL LAW

The Respondent discusses four (4) means by which due process may be violated and contends that the Silvers have no right of review under any of these theories. Respondent fails to recognize that due process can be violated "by the impact" of a state court's ruling regarding that state's own procedural laws.[1] While it is true that the Silvers do not contest the legitimate purposes served by, nor the basic constitutionality of, the Oklahoma Pleading Code, the Oklahoma Supreme Court Rules, the Insurance Code nor any other applicable set of rules or statutes, the Silvers disagree with the Respondent's assessment that no allegation was presented "that constitutional statutes were unconstitutionally applied to them so as to deny Petitioners unequal [sic] protection"[2] or that no challenge has

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[1]See, Chandler v. Florida, 101 S.Ct. 802, 818, 449 U.S. 560, 581, 66 L.Ed.2d 740 (1981).

[2]Respondent's Brief in Opposition to Petition for Certiorari, page 13.

been made to the denial of "the full panoply of judicial process".[3] On the contrary, the Silvers' appeal rests on the failure of the Oklahoma Supreme Court to apply the legal procedures proscribed and thereby arbitrarily denied due process of law to the Silver family.

The trial court overruled the Respondent's Motion to Dismiss, thereby ruling that the Petitioners' Petition did, in fact, state a claim for relief. The parties were ordered to submit briefs on the issue of uninsured motorist coverage and the trial court treated this order as a motion for summary judgment, ruling in favor of the Respondent. The Silvers' appeal was taken from that ruling, but the Oklahoma Supreme Court arbitrarily utilized procedures which violate basic tenets of due process in construction of the pleading without a further subsequent order for remand to permit Petitioners a required opportunity to amend its pleading. It is this failure to strictly enforce the statutory mandates of the Oklahoma Pleading Code which violates the Silvers' right to due process.

The Silvers agree that the Oklahoma Supreme Court has the sole prerogative to determine issues of state substantive

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[3] Id.

law,[4] by which a federal court is usually bound, and cannot correct.[5] Such authoritative interpretation is said to be made part of the statute "as if it had been amended by the legislature".[6] However, the facts of the case at bar do not involve a state substantive issue of law but, rather, entails a procedure which violates basic tenets of justice and fair play. The Oklahoma Pleading Code adopts and incorporates the fundamental aspects of the federal pleading code.[7] The rules are not "peculiar to the State" of Oklahoma nor entail any

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[4]Wakinekona v. Olim, supra.

[5]Tarr v. Manchester Ins. Corp, 544 F.2d 14 (1st Cir. 1976).

[6]Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), quoting Winters v. New York, 68 S.Ct. 665, 669, 333 U.S. 507, 514, 92 L.Ed. 840 (1948).

[7]Introductory Committee Comment to the Oklahoma Pleading Code, OKLA. STAT., tit 12, §§ 2001 et seq.

> In order to take fullest advantage of the case law interpreting the Federal Rules and the Advisory Notes, the Oklahoma Pleading Code tracks the Federal Rules closely. Where the text of the Federal Rules has been adopted in the Oklahoma Pleading Code, the construction placed on it by federal and state courts should be presumed to have been adopted as well. See, Laubach v. Morgan, 588 P.2d 1071, 1073 (Okla. 1978); Baker v. Knott, 494 P.2d 302, 304 (Okla. 1972).

variance between particular words.[8] The facts of the present case do not support the rule that the state has the prerogative to enforce a particular state law. Even if such were the case, the state must comply with the federal due process requirements since "[s]tate courts are obligated to enforce applicable federal law."[9]

Respondent suggests in the heading of Subproposition "A"[10] that the Oklahoma Supreme Court's decision is based upon independent and adequate state grounds and, therefore, should be precluded from review. Certainly, the state is given the power to promulgate and enforce laws according to the wishes of the citizens of that state, and, if the judgment below rests on independent and adequate grounds, this Court would

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[8]Respondent's Brief in Opposition, p. 12, citing Duncan v. Tennessee, 92 S.Ct. 785, 405 U.S. 127, 31 L.Ed.2d 86 (1972), involving two state criminal statutes which differentiate between robbery using a "rifle" and robbery using a "pistol".

[9]Wakinekona v. Olim, 664 F.2d 708, 715, cert. denied, 102 S.Ct. 2294, 456 U.S. 1005, 73 L.Ed.2d 1299, reversed, 103 S.Ct. 1741, 461 U.S. 238, 75 L.Ed.2d 813, on remand, 716 F.2d 1279 (9th Cir. 1981), citing U.S. CONST. Art. VI, cl. 2.

[10]Respondent's Brief in Opposition, page 11.

have no jurisdiction to decide the questions before it.[11] However, even though the state has a legitimate interest in enforcing its procedural rule,[12] the procedural ground is not "adequate" unless the rule is strictly and regularly enforced and provides federal constitutional safeguards.[13]

The Oklahoma Supreme Court has failed to apply the law first set out in Conley v. Gibson,[14] as well as the Oklahoma Pleading Code, which states that technical pleading form is not required in order to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[15] The "fundamental requirement of civil procedure [is that] '[a]ll pleadings shall be so construed as to do substantial justice.'"[16]

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[11]Zacchini v. Scripps-Howard Broadcasting Co., 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965, on remand, 376 N.E.2d 582, 54 Ohio St.2d 286, 8 O.O.3d 265 (1977).

[12]Michigan v. Tyler, 98 S.Ct. 1942, 436 U.S. 499, 56 L.Ed.2d 486 (1978).

[13]Hathorn v. Lovorn, 102 S.Ct. 2421, 457 U.S. 255, 72 L.Ed.2d 824, reh'g denied, 103 S.Ct. 15, 458 U.S. 1131, 73 L.Ed.2d 1401 (1982), citing Barr v. City of Columbia, 84 S.Ct. 1734, 378 U.S. 146, 149, 12 L.Ed.2d 766 (1964).

[14]78 S.Ct. 99, 355 U.S. 41, 2 L.Ed.2d 80 (1957).

[15]Conley v. Gibson, 355 U.S. at 47.

[16]Silver v. Slusher, 770 P.2d 878, 887 (1988), J. Wilson dissenting, citing OKLA. STAT. tit. 12, § 2008(F).

The touchstone of due process is protection of the individual against arbitrary action of government[17] and the United States Supreme Court has supervisory jurisdiction over state courts to evaluate the judgment in relation to the federal Constitution.[18] If the state's procedure cannot pass constitutional muster, as when the interpretation is unconstitutionally arbitrary,[19] or is "inconsistent with fundamental principles of liberty and justice",[20] review of the interpretation is within the authority of the United States Supreme Court.[21] Where the state court has erred, the proper forum for appeal is the United States Supreme Court.[22]

CONCLUSION

In the present case, the Oklahoma Supreme Court has

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[17]Daniels v. Williams, 106 S.Ct. 662, 474 U.S. 327, 331, 88 L.Ed.2d 662 (1986), quoting Dent v. West Virginia, 9 S.Ct. 231, 129 U.S. 114, 123, 32 L.Ed. 623 (1889).

[18]Chandler, supra.

[19]Muench v. Israel, 14 F.Supp. 1194, aff'd, 715 F.2d 1124, cert. denied, Worthing v. Israel, 104 S.Ct. 2682 (E.D. Mich. 1981).

[20]Ewing v. Winans, 749 F.2d 607, 609 (10th Cir. 1984), citing Silva v. Fox, 351 F.2d 61 (10th Cir. 1965).

[21]Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981).

[22]Aristocrat Health Club of Hartford, Inc. v. Chaucer, 451 F.Supp. 210 (D. Conn. 1978).

followed a procedure which is not only arbitrarily applied but is also so interwoven with a federally protected right as to afford an independent ground for United States Supreme Court review.[23] Federal courts will have subject-matter jurisdiction over the procedural due process claims arising under the federal constitution.[24] This Court maintains power to correct such judgment to the extent it is in conflict with the due process clause.[25] Since the Oklahoma Supreme Court rendered an opinion based upon a dismissal for failure to state a claim for relief, that court should have also taken appropriate action to remand the issue and allow the Silvers the opportunity to amend their pleading as required by Oklahoma law.

By: _____

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[23]Ohio v. Johnson, 104 S.Ct. 2536, 467 U.S. 493, 81 L.Ed.2d 425, reh'g denied, 105 S.Ct. 20 (1984).

[24]Sarfaty v. Sarfaty, 534 F. Supp. 701 (E.D. Pa. 1982); Johnston v. Shaw, 556 F.Supp. 406 (N.D. Tex. 1982).

[25]Tibbs v. Florida, 102 S.Ct. 2211, 457 U.S. 31, 72 L.Ed.2d 652 (1982).

Oklahoma City, Oklahoma 73102
(405) 235-2404

ATTORNEY FOR PETITIONERS

Respectfully submitted this _____ day of September, 1989.

PROOF OF SERVICE

I, Clifton D. Naifeh, Counsel of Record for Randall and Mikala Silver, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of September, 1989, I served a copy of the foregoing PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI to the Supreme Court of the United States on Farmers and Merchants Insurance Company, the Respondent herein, by delivering a copy thereof to Jim W. Lee, Esq., attorney of record for the Respondent, at his office located at 2728 N.W. 39th Street, P. O. Box 1907, Oklahoma City, Oklahoma, 73157-7320.

CLIFTON D. NAIFEH